

25-45  
No. 12001

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United States  
Court of Appeals

for the Ninth Circuit

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GENERAL INSURANCE COMPANY OF  
AMERICA, a Corporation,

Appellant,

vs.

HENRY O. LINK, E. W. ELLIOTT and  
O. L. GRIMES,

Appellees.

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Apostles on Appeal

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Upon Appeal from the District Court of the United States  
for the Western District of Washington,  
Northern Division

FILED  
SEP - 8 1948

PAUL P. O'BRIEN,  
COUNSEL



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# INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

|   | PAGE |
|---|------|
| Adoption of Points to be Relied Upon on<br>Appeal (USCA) .....                  | 269  |
| Amended Libel .....   | 30   |
| Answer of Respondent.....   | 36   |
| Assignment of Errors.....   | 54   |
| Appeal:   |      |
| Adoption of Points to be Relied Upon on<br>(USCA) .....                         | 269  |
| Assignment of Errors on.....  | 54   |
| Certificate of Clerk to Apostles on.....  | 61   |
| Citation on .....   | 62   |
| Cost and Supersedeas Bond on.....   | 56   |
| Designation of Contents of Apostles on (DC)                                     | 59   |
| Designation of Portions of Apostles on Ap-<br>peal to be Printed on (USCA)..... | 269  |
| Order Allowing .....  | 56   |
| Petition for .....  | 53   |
| Statement of Points on (USCA).....  | 269  |
| Stipulation Authorizing Consideration of<br>Original Exhibits on (USCA).....    | 271  |
| Stipulation Authorizing Transmittal of Orig-<br>inal Exhibits on (DC).....      | 58   |

## ii.

|   | PAGE |
|---|------|
| Certificate of Clerk to Apostles on Appeal.....   | 61   |
| Citation on Appeal.....   | 62   |
| Affidavit of Service.....   | 63   |
| Cost and Supersedeas Bond.....  | 56   |
| Decree, Final .....   | 51   |
| Designation of Contents of Apostles on Appeal<br>(DC) .....   | 59   |
| Designation of Portions of Apostles on Appeal<br>to be Printed, Statement of Points and<br>(USCA) .....   | 269  |
| Exceptions of Respondent to Libel.....  | 28   |
| Findings of Fact and Conclusions of Law,<br>Opinion and .....   | 41   |
| Libel .....   | 2    |
| Exhibit A—Policy of Insurance No. MWR<br>1151, dated May 4, 1942.....   | 6    |
| Exhibit B—Statement of General and Par-<br>ticular Average—Admitted as Libelant's<br>Exhibit No. 5 and sent up as part of orig-<br>inal exhibits. |      |
| Libel, Amended .....  | 30   |
| Names and Addresses of Counsel.....   | 1    |
| Opinion, Findings of Fact and Conclusions of<br>Law .....   | 41   |
| Order Allowing Appeal.....  | 56   |

|  | PAGE     |
|--|----------|
| Order Overruling Exceptions to Amended Libel                           | 34       |
| Petition for Appeal.....   | 53       |
| Statement of Points on Appeal (USCA).....                              | 269      |
| Stipulation Authorizing Consideration of Original Exhibits (USCA)..... | 271      |
| Stipulation Authorizing Transmittal of Original Exhibits (DC).....     | 58       |
| Stipulation Granting Leave to Libelants to File an Amended Libel.....  | 29       |
| Stipulation of Facts re Amount of Loss.....                            | 38       |
| Transcript of Proceedings at Trial.....                                | 64       |
| Final Oral Arguments.....  | 229      |
| Witnesses for Libelants:   |          |
| Jones, Winston J.  |          |
| —direct .....  | 78       |
| —cross .....   | 87       |
| —redirect .....  | 90, 92   |
| —recross .....   | 91       |
| Mills, Dean Elwood   |          |
| —direct .....  | 126      |
| —cross .....   | 141      |
| —redirect .....  | 149, 152 |
| —recross .....   | 151      |
| Parks, Lawrence A.   |          |
| —direct .....  | 93       |
| —cross .....   | 107, 115 |
| —redirect .....  | 120, 125 |
| —recross .....   | 124      |

## Transcript of Proceedings at Trial—(Cont'd.)

## Witnesses for Libelants—(Cont'd)

Rose, George William

|                 |          |
|-----------------|----------|
| —direct .....   | 153      |
| —cross .....    | 167, 201 |
| —redirect ..... | 204      |

Zeusler, Frederick

|                 |     |
|-----------------|-----|
| —direct .....   | 180 |
| —cross .....    | 193 |
| —redirect ..... | 200 |
| —recross .....  | 200 |

## Witness for Respondent:

Beasley, Marvin S.

|                 |     |
|-----------------|-----|
| —direct .....   | 206 |
| —cross .....    | 213 |
| —redirect ..... | 217 |
| —recross .....  | 218 |

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Seattle 4, Washington. [1\*]

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\*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States for  
the Western District of Washington, Northern  
Division

In Admiralty—No. 14378

HENRY O. LINK and E. W. ELLIOTT,  
Libelants,

vs.

GENERAL INSURANCE COMPANY OF  
AMERICA, a corporation,  
Respondent.

### LIBEL

The libel of Henry O. Link and E. W. Elliott against the respondent General Insurance Company of America, a corporation, in a cause of contract, civil and maritime, alleges:

#### I.

That libelants Henry O. Link and E. W. Elliott are now and at all times herein mentioned were respectively the owner and bareboat charterer of the vessel called the "Eastern Prince" and although no other person has an interest in the recovery herein sought under the policy of insurance hereinafter mentioned, said libelants bring this libel on their own behalf and on behalf of all persons who may be interested therein.

#### II.

That respondent is a corporation organized and existing under and by virtue of the laws of the State of Washington with its principal place of

business in the Western District of Washington, Northern Division, and is authorized and licensed to make insurance contracts, including the insurance hereinafter referred to. That on May 4, 1942, respondent, in consideration of an agreed premium paid therefor, issued its certain policy of insurance, No. MWR 1151, to libelants wherein and whereby respondent insured libelants and the United States of America and agreed to assume [2] and pay all loss or damage resulting to libelants and said vessel as a result of said vessel being in collision, together with general average, salvage and special charges and sue and labor expense incident thereto, consequent upon hostilities or warlike operations (loss payable to O. L. Grimes), all as in said policy of insurance more particularly provided, a photostatic copy thereof being hereto attached, marked Exhibit "A", and by this reference made a part hereof.

### III.

That on May 11, 1942, and for some time prior thereto a state of war existed between the United States of America and the Empire of Japan and on said date, while said vessel was proceeding in connection with the prosecution of said war by the United States of America on a voyage from the Port of Seattle, Washington, to the Port of Skagway, Territory of Alaska, with supplies and equipment for a military highway being constructed by the United States of America and while approaching Seymour Narrows and being in all respects



properly navigated, was in collision with the Tanker Roustabout, a Naval vessel of the United States of America then and there being operated in connection with the prosecution of said war in the military and naval service of the United States of America in the transportation of military and naval supplies, to wit, petroleum products, between military and naval bases of the United States in the Territory of Alaska and points of supply on the West Coast of the United States of America; that said collision occurred as the result of the sole fault of said Tanker Roustabout in that the same was negligently and carelessly navigated by failing, as was her duty, to effect a port to port passage with said vessel Eastern Prince and struck said vessel Eastern Prince on her after port quarter. [3]

#### IV.

That as a result of said collision said vessel Eastern Prince sustained substantial damage to her hull and equipment and was required to proceed to Campbell River and thence to Vancouver, British Columbia, for repairs and libelants incurred or paid charges necessarily incurred in respect thereof in the sum of \$12,301.11, all as more fully appears in the Statement of General and Particular Average prepared on behalf of libelants by W. E. Morrow & Company, Average Adjusters, a copy thereof being filed herewith, marked Exhibit "B," and by this reference made a part hereof.

#### V.

That there is due and owing to libelants from



respondent on its said policy of insurance the sum of \$11,031.29, all as more fully appears from said Exhibit "B," and although demand accompanied by the submission of said Exhibit "B" was heretofore made on respondent for payment on the 11th day of September, 1942, respondent has refused to pay the same.

#### VI.

That as more fully appears in said Exhibit "B," libelants have applied for remission of duty payable under United States Revised Statutes, Sec. 3114, and if such remission be not granted an additional ad valorem duty of 50 per cent on the cost of repairs performed on said vessel Eastern Prince will be payable and will be a proper claim against respondent.

#### VII.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of this court.

Wherefore, libelants pray that process in due form of law according to the practice of this court in causes of admiralty and maritime jurisdiction may issue against respondent General [4] Insurance Company of America, and that it be required to appear and answer upon oath, all and singular, the matters aforesaid; that the court decree payment by respondent to libelants of the sum of \$11,031.29, with interest at six per cent from the 5th day of September, 1942, together with plaintiffs' costs and disbursements herein to be taxed,

and that the court retain jurisdiction for the purpose of ascertaining what further amount, if any, may be payable by respondent in connection with the ad valorem duty aforesaid, and that libelants may have such other and further relief in the premises as in law and in justice they may be entitled to receive.

BOGLE, BOGLE & GATES,  
EDWARD G. DOBRIN,  
STANLEY B. LONG,  
Proctors for Libelants.

[Duly verified.]

EXHIBIT "A"

\$40,000

No. MWR 1151

GENERAL INSURANCE COMPANY  
OF AMERICA

Seattle, Washington

By This Policy of Insurance does insure Henry O. Link, Owner; E. W. Elliott (Alaska Division) and United States of America, Charterers, as follows:

In Consideration of the said person or persons effecting this policy promising to pay to the said company the sum of Five Hundred Dollars as a premium at and after the rate of 1.25 per cent for such insurance the said company takes upon itself

Exhibit "A"—(Continued)

the burden of such insurance to the amount of Forty Thousand Dollars and promises and agrees with the assured, their executors and administrators in all respects truly to perform and fulfill the contract contained in this policy. And it is hereby agreed and declared that the said insurance shall be and is an insurance upon—As Per Form Attached—of and in the good.....called the.....or by whatsoever other name or names the said ship is or shall be named or called, lost or not lost, at and from Warranted confined to the waters of Oregon, Washington Coasts, Puget Sound, British Columbia, and Southeastern Alaska, Not West of Cape Spencer.

American Institute

6-Q

Time (Hulls)

July 1, 1941

To be attached to and form a part of Policy No. MWR 1151 of the General Insurance Company.

Dated May 1, 1942.

For Account of Assured but subject to the provisions of this Policy with respect to change of ownership.

Should the Vessel be sold or transferred to other ownership or chartered on a bareboat basis or requisitioned on that basis, then, unless the Underwriters agree thereto in writing, this Policy shall thereupon become cancelled from date of such sale, transfer, charter, or requisition; provided, however, that in the case of an involuntary transfer by requisition or otherwise, without the prior execution

## Exhibit "A"—(Continued)

of any written agreement by the Assured, such cancellation shall take place fifteen days after such transfer; and provided further that if the Vessel has cargo on board and has already sailed from her loading port, or is at sea in ballast, such cancellation shall be suspended until arrival at final port of discharge if with cargo or at port of destination if in ballast. This insurance shall not inure to the benefit of any such charterer or transferee of the Vessel, and if a loss payable hereunder should occur during such period of fifteen days the Underwriters shall be subrogated to all the rights of the Assured against the transferee, by reason of such transfer, in respect to all or part of such loss as is recoverable from the transferee and in proportion which the respective amounts insured bear to the insured value. A pro rata daily return of net premium shall be made. The foregoing provisions with respect to cancellation in the event of sale, transfer, charter or requisition shall apply even in the case of insurance "for account of whom it may concern".

Loss, if any, payable to O. L. Grimes or order.

In the sum of Forty Thousand Dollars, at and from the 1st day of May, 1942, to the 1st day of August, 1942, beginning and ending with Noon Pacific Standard time.

Provided, however, should the Vessel at the expiration of this Policy be at sea, or in distress, or at a port of refuge or of call, she shall, provided previous notice be given to the Underwriters, be held covered at a pro rata monthly premium to her port of

Exhibit "A"—(Continued)

destination. On the vessel called the "Eastern Prince" (or by whatsoever name or names the said Vessel is or shall be called).

The said Vessel, for so much as concerns the Assured, by agreement between the Assured and Underwriters in this Policy, is and shall be valued at as follows:

|  |                          |
|--|--------------------------|
| Hull, tackle, apparel, passenger fittings,<br>equipment, stores, ordnance, munitions,<br>boats and other furniture.....\$..... |                          |
| Boilers, machinery, refrigerating machinery and insulation and everything connected therewith .....                            | Total Value<br>\$ 40,000 |

Donkey boilers, winches, cranes, windlasses, steering gear and electric light apparatus shall be deemed to be a part of the hull and not of the machinery.

The underwriters to be paid in consideration of this insurance Five Hundred Dollars, being at the rate of 1.25 per cent.

Special Conditions and Warranties:

Warranted confined to the waters of Oregon, Washington Coasts, Puget Sound, British Columbia, and Southeastern Alaska, Not West of Cape Spencer.

In event of non-payment of premium thirty days after attachment this Policy may be cancelled by the Underwriters upon five days written notice being given the Assured.

To return and arrival

~~cents per cent. net for each uncommenced month if it be mutually agreed to cancel this Policy.~~



## Exhibit "A"—(Continued)

~~As follows for each consecutive 30 days the~~

Vessel may be laid up in port, viz.:—

cents per cent. net under repair or outside the United States;

cents per cent. net in the United States with cargo on board and not under repair;

cents per cent. net in the United States not under repair, and with no cargo on board excepting while actually loading or discharging.

Provided always: (a) that in no case shall a return be allowed when the within named Vessel is lying in a roadstead or in exposed and unprotected waters.

(b) that in the event of a return for special trade or any other reason, being recoverable, the above rates of return of premium shall be reduced accordingly.

In the event of the Vessel being laid up in port for a period of 30 consecutive days, a part only of which attaches to this Policy, it is hereby agreed that the laying up period, in which either the commencing or ending date of this Policy falls, shall be deemed to run from the first day on which the Vessel, is laid up and that on this basis Underwriters shall pay such proportion of the return due in respect of a full period of 30 days as the number of ~~days attaching thereto bear to thirty. [6]~~

Beginning the adventure upon the said Vessel, as above, and so shall continue and endure during the period aforesaid, as employment may offer, in port

## Exhibit "A"—(Continued)

and at sea, in docks and graving docks, and on ways, gridirons and pontoons, at all times, in all places, and on all occasions, services and trades whatsoever and wheresoever, under steam, motor power or sail; with leave to sail or navigate with or without pilots, to go on trial trips and to assist and tow vessels or craft in distress, but if without the approval of Underwriters the Vessel be towed, except as is customary or when in need of assistance, or undertakes towage or salvage services under a pre-arranged contract made by Owners and/or Charterers, the Assured shall pay an additional premium if required by the Underwriters but no such premium shall be required for customary towage by the Vessel in connection with loading and discharging. With liberty to discharge, exchange and take on board goods, specie, passengers and stores, wherever the Vessel may call at or proceed to, and with liberty to carry goods, live cattle, &c., on deck or otherwise. Including all risks of docking, undocking, changing docks, or moving in harbor and going on or off gridiron or graving dock as often as may be done during the currency of this Policy.

In the event of accident whereby loss or damage may result in a claim under this Policy, notice shall be given in writing to the Underwriters, where practicable, prior to survey, so that they may appoint their own surveyor if they so desire. The Underwriters shall be entitled to decide the port to which a damaged Vessel shall proceed for docking or repairing (the actual additional expense of the voyage

## Exhibit "A"—(Continued)

arising from compliance with Underwriters' requirements being refunded to the Assured) and Underwriters shall also have a right of veto in connection with the place of repair or repairing firm proposed and whenever the extent of the damage is ascertainable the majority (in amount) of the Underwriters may take or may require to be taken tenders for the repair of such damage.

In cases where a tender is accepted with the approval of Underwriters, an allowance shall be made at the rate of 30 per cent. per annum on the insured value for each day or part thereof from the time of the completion of the survey until the acceptance of the tender provided that it be accepted without delay after receipt of Underwriters' approval.

No allowance shall be made for any time during which the Vessel is loading or discharging cargo or bunkering or taking in fuel.

Due credit shall be given against the allowance as above for any amount recovered:—

(a) in respect of fuel and stores and wages and maintenance of the Master, Officers and Crew or any member thereof allowed in General or Particular Average;

(b) from third parties in respect of damages for detention and/or loss of profit and/or running expenses; for the period covered by the tender allowance or any part thereof.

In the event of failure to comply with the conditions of this clause 15 per cent. shall be deducted from the amount of the ascertained claim.



Exhibit "A"—(Continued)

Warranted that the amount insured for account of the Assured and/or their managers on Disbursements, Commissions and/or similar interests, "policy proof of interest" or "full interest admitted" or on excess or increased value of Hull or Machinery, however described, shall not, except as indicated below, exceed 10 per cent. of the insured valuation of the Vessel, but the Assured may in addition thereto effect "policy proof of interest" or "full interest admitted" insurance on any of the following interests:

(a) Premiums. Any amount not in excess of actual premiums for twelve months on all interests of whatsoever nature insured (including estimated premium on any Protection and Indemnity Insurance), but in all cases reducing monthly by a proportionate amount of the whole, and

(b) Freight and/or Chartered Freight and/or Anticipated Freight and/or Earnings and/or Hire or Profits on Time Charter and/or Charter for series of voyages for any amount not exceeding in the aggregate 15 per cent. of the insured valuation of the Vessel; and if the actual amount at risk on any or all of such interests shall exceed such 15 per cent. of the insured valuation of the Vessel, the Assured and/or their managers may, without prejudice to this warranty, insure whilst at risk the excess of such interests reducing as earned, and

(c) Risks excluded by the "F. C. & S. Clause", and

(d) Loss or damage in consequence of strikes,

## Exhibit "A"—(Continued)

lockouts, political or labor disturbances, civil commotions, riots, martial law, military or usurped power or malicious act.

Provided always that a breach of this warranty shall not afford the Underwriters any defense to a claim by mortgagees or other third parties who may have accepted this Policy without notice of such breach of warranty nor shall it restrict the right of the Assured and/or their managers to insure in addition General Average and/or Salvage Disbursements whilst at risk.

Held covered in case of any breach of warranty as to cargo, trade, locality or date of sailing, provided notice be given and any additional premium required be agreed immediately after receipt of advices of breach or proposed breach by Owners.

Touching the Adventures and Perils which we, the said Underwriters, are contented to bear and take upon us, they are of the Seas, Men-of-War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Counter-Mart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and Peoples, or what nation, condition or quality soever, Barratry of the Master and Mariners and of all other like Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said Vessel, &c., or any part thereof; excepting, however, such of the foregoing Perils as may be excluded by provisions elsewhere in the Policy or by endorsement. And in case of any Loss or Misfortune, it shall be lawful for the

Exhibit "A"—(Continued)

Assured, their Factors, Servants and Assigns, to sue, labor and travel for, in, and about the Defense, Safeguard and Recovery of the said Vessel, &c., or any part thereof, without prejudice to this Insurance, to the Charges whereof the Underwriters will contribute their proportion as provided below. And it is expressly declared and agreed that no acts of the Underwriters or Assured in recovering, saving or preserving the property insured shall be considered as a waiver or acceptance of abandonment.

This insurance also specially to cover (subject to the Average Warranty) loss of or damage to hull or machinery directly caused by the following:—

Accidents in loading, discharging or handling cargo, or in bunkering or in taking in fuel;

Explosions on shipboard or elsewhere;

Bursting of boilers, breakage of shafts or any latent defect in the machinery or hull (excluding, however, the cost and expense of repairing or renewing the defective part);

Contact with Aircraft;

Negligence of Master, Charterers, Mariners, Engineers or Pilots;

Provided such loss or damage has not resulted from want of due diligence by the Owners of the Vessel, or any of them, or by the Managers.

Masters, Mates, Engineers, Pilots or Crew not to be considered as part owners within the meaning of this clause should they hold shares in the Vessel.

And it is further agreed that in the event of salvage, towage or other assistance being rendered

## Exhibit "A"—(Continued)

to the Vessel hereby insured by any Vessel belonging in part or in whole to the same Owners or Charterers, the value of such services (without regard to the common ownership or control of the Vessels) shall be ascertained by arbitration in the manner below provided for under the Collision Clause, and the amount so awarded so far as applicable to the interest hereby insured shall constitute a charge under this Policy.

General Average, Salvage and Special Charges payable as provided in the contract of affreightment, or failing such provision, or there be no contract of affreightment, payable in accordance with the Laws and Usages of the Port of New York. Provided always that when an adjustment according to the laws and usages of the port of destination is properly demanded by the owners of the cargo, General Average shall be paid in accordance with same.

When the contributory value of the Vessel is greater than the valuation herein the liability of these Underwriters for General Average contribution (except in respect to amount made good to the Vessel) or Salvage shall not exceed that proportion of the total contribution due from the Vessel that the amount insured hereunder bears to the contributory value; and if because of damage for which these Underwriters are liable as Particular Average the value of the Vessel has been reduced for the purpose of contribution, the amount of the Particular Average claim under this Policy shall be deducted from the amount insured hereunder and

Exhibit "A"—(Continued)

these Underwriters shall be liable only for the proportion which such net amount bears to the contributory value.

In the event of expenditure for Salvage, Salvage Charges or under the Sue and Labor Clause, this Policy shall only be liable for its share of such proportion of the amount chargeable to the property hereby insured as the insured value, less loss and/or damage, if any, for which the Underwriters are liable, bears to the value of the salvaged property. Provided that where there are no proceeds or there are expenses in excess of the proceeds, the expenses, or the excess of the expenses, as the case may be, shall be apportioned upon the basis of the sound value of the property at the time of the accident and this Policy without any deduction for loss and/or damage shall bear its pro rata share of such expenses or excess of expenses accordingly.

Notwithstanding anything herein contained to the contrary, this Policy is warranted free from Particular Average under 3 per cent., or unless amounting to \$4,850, but nevertheless when the Vessel shall have been stranded, sunk, on fire, or in collision with any other Ship or Vessel, Underwriters shall pay the damage occasioned thereby, and the expense of sighting the bottom after stranding shall be paid, if reasonably incurred, even if no damage be found.

Grounding in the Panama Canal, Suez Canal or in the Manchester Ship Canal or its connections, or in the River Mersey above Rock Ferry Slip, or in



**Exhibit "A"—(Continued)**

the River Plate (above a line drawn from the North Basin, Buenos Aires, to the mouth of the San Pedro River) or its tributaries, or in the Danube or Demerara Rivers, or on the Yenikale Bar, shall not be deemed to be a stranding.

Average payable on each valuation separately or on the whole, without deduction of thirds, new for old, whether the Average be Particular or General.

No claim shall in any case be allowed in respect of scraping or painting the Vessel's bottom.

The warranty and conditions as to Average under 3 per cent. to be applicable to each voyage as if separately insured, and a voyage shall be deemed to commence at one of the following periods to be selected by the Assured when making up the claim, viz.: at any time at which the Vessel (1) begins to load cargo or (2) sails in ballast to a loading port. Such voyage shall be deemed to continue during the ensuing period until either she has made one outward and one homeward passage (including an intermediate ballast passage, if made) or has carried and discharged two cargoes, whichever may first happen, and further, in either case, until she begins to load a subsequent cargo or sails in ballast for a loading port. When the Vessel sails in ballast to effect damage repair such sailing shall not be deemed to be a sailing for a loading port although she loads at the repairing port. In calculating the 3 per cent. above referred to, Particular Average occurring outside the period covered by this Policy may be added to Particular Average occurring

Exhibit "A"—(Continued)

within such period provided it occur upon the same voyage (as above defined), but only that portion of the claim arising within such period shall be recoverable hereon. The commencement of a voyage shall not be so fixed as to overlap another voyage on which a claim is made on this or the preceding Policy.

No recovery for a Constructive Total Loss shall and repairing the Vessel shall exceed the insured value.

In ascertaining whether the Vessel is a Constructive Total Loss the insured value shall be taken as be had hereunder unless the expense of recovering the repaired value, and nothing in respect of the damaged or break-up value of the Vessel or wreck shall be taken into account.

In the event of Total or Constructive Total Loss, no claim to be made by the Underwriters for freight, whether notice of abandonment has been given or not.

In no case shall Underwriters be liable for unrepaired damage in addition to a subsequent Total Loss sustained during the term covered by this Policy.

And it is further agreed that if the Vessel hereby insured shall come into collision with any other Ship or Vessel and the Assured or the Charterers in consequence thereof or the Surety for either or both of them in consequence of their undertaking shall become liable to pay and shall pay by way of damages to any other person or persons any sum or

## Exhibit "A"—(Continued)

sums in respect of such collision, we, the Underwriters, will pay the Assured or Charterers such proportion of such sum or sums so paid as our respective subscriptions hereto bear to the value of the Vessel hereby insured, provided always that our liability in respect of any one such collision shall not exceed our proportionate part of the value of the Vessel hereby insured. And in cases where the liability of the Vessel has been contested, or proceedings have been taken to limit liability, with the consent in writing of a majority (in amount) of the Underwriters on the hull and/or machinery, we will also pay a like proportion of the costs which the Assured or Charterers shall thereby incur, or be compelled to pay; but when both Vessels are to blame, then, unless the liability of the Owners or Charterers of one or both of such Vessels becomes limited by law, claims under the Collision Clause shall be settled on the principle of Cross-Liabilities as if the Owners or Charterers of each Vessel had been compelled to pay to the Owners or Charterers of the other of such Vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the Assured or Charterers in consequence of such collision; and it is further agreed that the principles involved in this clause shall apply to the case where both Vessels are the property, in part or in whole, of the same Owners or Charterers, all questions of responsibility and amount of liability



## Exhibit "A"—(Continued)

as between the two Vessels being left to the decision of a single Arbitrator, if the parties can agree upon a single Arbitrator, or failing such agreement, to the decision of Arbitrators, one to be appointed by the Managing Owners or Charterers of both Vessels, and one to be appointed by the majority (in amount) of Hull Underwriters interested; the two Arbitrators chosen to choose a third Arbitrator before entering upon the reference, and the decision of such single, or of any two of such three Arbitrators, appointed as above, to be final and binding. Provided always that this clause shall in no case extend to any sum which the Assured or Charterers may become liable to pay or shall pay for removal of obstructions under statutory powers, for injury to harbors, wharves, piers, stages and similar structures, consequent on such collision, or in respect of the cargo or engagements of the Insured Vessel, or for loss of life, or personal injury. And provided also that in the event of any claim being made by Charterers under this clause they shall not be entitled to recover in respect of any liability to which the Owners of the Vessel, if interested in this Policy at the time of the collision in question, would not be subject, nor to a greater extent than the Shipowners would be entitled in such event to recover.

The terms and conditions of this form are to be regarded as substituted for those of policy form to which it is attached, the latter being hereby waived, except provisions required by law to be inserted in the Policy.

## Exhibit "A"—(Continued)

[Printed in margin of Policy:]

Unless physically deleted by the Underwriters, the following warranty shall be paramount and shall supersede and nullify any contrary provisions of the Policy:

## F. C. &amp; S. Clause.

Notwithstanding anything to the contrary contained in the Policy, this insurance is warranted free from any claim for loss, damage or expense caused by or resulting from capture, seizure, arrest, restraint or detainment, or the consequences thereof or of any attempt thereat, or any taking of the Vessel, by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise, also from all consequences of hostilities or warlike operations (whether there be a declaration of war or not), piracy, civil war, revolution, rebellion or insurrection, or civil strife arising therefrom.

If war risks are hereafter insured by endorsement on the Policy, such endorsement shall supersede the above warranty only to the extent that their terms are inconsistent and only while such war risk endorsement remains in force. [7]

Touching the adventures and perils which the said company is content to bear and does take upon itself, they are of the seas, fires, pirates, rovers, assassins, thieves, jettisons, criminal barratry of the master and mariners, and of all other like perils, losses and misfortunes, that have or shall come to

Exhibit "A"—(Continued)

the hurt, detriment, or damage of the aforesaid subject matter of this insurance or any part thereof.

In case of any loss or misfortune it shall be lawful and necessary for the assured, their factors, servants and assigns, to sue, labor, and travel for, in and about the defence, safeguard, and recovery of the aforesaid subject matter of this insurance, or any part thereof, without prejudice to this insurance; the charges whereof the said company shall bear in proportion to the sum hereby insured.

It is expressly declared and agreed that no acts of the said company or assured in recovering, saving, or preserving the property insured shall be considered as a waiver or acceptance of abandonment.

Provisions Required by Law to be Stated in This Policy. This Policy is in a Stock Corporation.

In Witness Whereof, this company has executed and attested these presents; but this policy shall not be valid until countersigned by the duly authorized agent of the company.

/s/ W. W. DENT,  
President.

/s/ L. E. CROWE,  
Secretary,

Countersigned at Seattle, Washington, this 4th day of May, 1942.

PARKER-SMITH COMPANY,  
/s/ GRAHAM J. SMITH,  
Agent. [8]

## Exhibit "A"—(Continued)

THIS POLICY COVERS WAR AND STRIKES  
RISKS ONLY AS FOLLOWS AND IS WAR-  
RANTED FREE OF ALL OTHER CLAIMS

WAR RISK CLAUSES

It is agreed that this insurance covers only those risks which would be covered by the attached policy (including the Collision Clause) in the absence of the F. C. & S. warranty contained therein but which are excluded by that warranty.

This insurance is also subject, however, to the following warranties and additional clauses:—

The Adventures and Perils Clause shall be construed as including the risks of piracy, civil war, revolution, rebellion or insurrection or civil strife arising therefrom, floating and/or stationary mines and/or torpedoes whether derelict or not and/or military or naval aircraft and/or other engines of war including missiles from the land, and warlike operations and the enforcement of sanctions by members of the League of Nations, whether before or after declaration of war and whether by a belligerent or otherwise; but excluding arrest, restraint or detainment under customs or quarantine regulations, and similar arrests, restraints or detainments not arising from actual or impending hostilities or sanctions.

The Franchise warranty in the attached policy is waived and average shall be payable irrespective of percentage and without deduction of new for old. The provisions of the attached policy with respect

Exhibit "A"—(Continued)

to constructive total loss shall apply only to claims arising from physical damage to the insured vessel.

Warranted free of any claim for delay or demurrage and warranted not to abandon in case of capture, seizure or detention, until after condemnation of the property insured. Also warranted not to abandon in case of blockade and free from any claims for loss or expense in consequence of blockade or of any attempt to evade blockade; but in the event of blockade to be at liberty to proceed to an open port and there end the voyage.

Warranted free of any claim based upon loss of or frustration of the insured voyage or adventure caused by arrests, restraints or detainments, of kings, princes, or peoples.

Warranted free from any claim arising from capture, seizure, arrests, restraints, detainments, condemnation, preemption or confiscation by the Government of the United States or the Government of any State therein.

The premium paid for this insurance shall not be subject to any return for lay-ups or otherwise.

It is understood and agreed that the "10% Disbursements Warranty" in the within policy is amended to include the words "against the risks herein insured" between the words "described" and "shall".

The "Breach of Warranty" clause in the printed policy is deleted and the following clause substituted therefor—



## Exhibit "A"—(Continued)

"Held covered in the event of any breach of warranty as to date of sailing, or deviation, or change of voyage, or other variation of the voyage, provided prompt notice be given these Insurers when such facts are known to the Assured and/or their managers and an additional premium paid if required."

\* \* \* \*

If the vessel be insured under marine policies which include the risks of pirates, claims arising from piracy shall nevertheless be paid under this policy and the underwriters hereof shall have no right to contribution from the underwriters on such marine policies, it being understood that as between the two sets of policies losses due to piracy are payable under marine policies only to the extent that such losses are not collectible under the war risk policies.

\* \* \* \*

## STRIKES RISK CLAUSE

This insurance also covers damage to or destruction of the property insured directly caused by strikers, locked out workmen, or persons taking part in labor disturbances or riots or civil commotions but this paragraph shall not be construed to include or cover any loss, damage or expense caused by or

Exhibit "A"—(Continued)

resulting from (a) civil war, revolution, rebellion, or insurrection, or civil strike arising therefrom, or (b) delay, detention or loss of use.

Marine 466 3/42 [9]

Marine Department

No. MWR 1151

Expires: August 1, 1942

Am't, \$40,000

Premium, \$500

Assured: Henry O. Link, Owner;

E. W. Elliott Et Al

Vessel: "Eastern Prince"

General Insurance Company of America

Seattle, Washington

Parker-Smith Company

Insurance

Main 2060

Skinner Building

Seattle

EXHIBIT "B"

Clerk's Note: Exhibit "B", Statement of General and Particular Average, Case of S.S. "Eastern Prince", attached to Libel at time of filing, later admitted as Libelant Exhibit 5 at trial of cause, and sent up as part of original exhibits pursuant to order of court.

[Endorsed]: Filed Oct. 19, 1942. [10]

[Title of District Court and Cause.]

EXCEPTIONS OF RESPONDENT TO LIBEL  
(Peremptory)

Comes now the respondent above named, General Insurance Company of America, and excepts to the libel herein upon the following grounds:

1. That the facts averred in the libel are not sufficient to constitute a cause of action.

2. That the facts averred in the libel do not constitute a cause of action within the admiralty and maritime jurisdiction of this court.

3. That there is a defect in the parties libelant in that the libel clearly shows that the United States of America and O. L. Grimes are necessary parties to this action.

Dated this 7th day of November, 1942.

SKEEL, McKELVY, HENKE,  
EVENSON & UHLMANN,  
Proctors for Respondent.

[Endorsed]: Filed Nov. 9, 1942. [11]



[Title of District Court and Cause.]

STIPULATION GRANTING LEAVE TO LI-  
BELANTS TO FILE AN AMENDED LIBEL

It Is Hereby Stipulated and Agreed between Henry O. Link and E. W. Elliott, libelants in the above entitled action, by and through their proctors, Messrs. Bogle, Bogle & Gates, and General Insurance Company of America, a corporation, by and through its proctors, Skeel, McKelvy, Henke, Evenson & Uhlmann, that said libelants be granted leave to file an amended libel herein.

It Is further Stipulated and Agreed that the exceptions heretofore taken by said respondent to the original libel on file herein be deemed and the same are hereby taken to said amended libel to be filed herein, with leave to respondent to file any supplemental exceptions within 14 days of the filing hereof.

BOGLE, BOGLE & GATES,  
Proctors for Libelants.

SKEEL, McKELVY, HENKE,  
EVENSON & UHLMANN,  
Proctors for Respondent.

It Is So Ordered.

Dated at Seattle, Washington, this 12th day of April, 1944.

JOHN C. BOWEN,  
Judge.

[Endorsed]: Filed April 12, 1944. [12]

[Title of District Court and Cause.]

### AMENDED LIBEL

The libel of Henry O. Link, E. W. Elliott and O. L. Grimes against the respondent, General Insurance Company of America, a corporation, in a cause of contract, civil and maritime, alleges:

#### I.

That libelants, Henry O. Link and E. W. Elliott, are now and at all times herein mentioned were respectively the owner and bareboat charterer of the vessel called the "Eastern Prince," and O. L. Grimes is the loss payee under the policy of insurance hereinafter mentioned, and although no other person has an interest in the recovery herein sought under the said policy of insurance, said libelants bring this libel on their own behalf and on behalf of all persons who may be interested therein.

#### II.

That respondent is a corporation organized and existing under and by virtue of the laws of the State of Washington with its principal place of business in the Western District of Washington, Northern Division, and is authorized and licensed to make insurance contracts, including the insurance hereinafter referred to. That on May 4, 1942, respondent, in consideration of an agreed premium paid therefor, issued its certain policy of insurance, No. MWR 1151, [13] to libelants, wherein and whereby respondent insured libelants and the

United States of America and agreed to assume and pay all loss or damage resulting to libelants and said vessel as a result of said vessel being in collision, together with general average, salvage and special charges and sue and labor expense incident thereto, consequent upon hostilities or war-like operations (loss payable to O. L. Grimes), all as in said policy of insurance more particularly provided, a photostatic copy thereof being attached to the original libel on file herein, marked Exhibit "A," and by this reference made a part hereof.

### III.

That on May 11, 1942, and for some time prior thereto, a state of war existed between the United States of America and the Empire of Japan and on said date, while said vessel was proceeding in connection with the prosecution of said war by the United States of America on a voyage from the Port of Seattle, Washington, to the Port of Skagway, Territory of Alaska, with supplies and equipment for a military highway being constructed by the United States of America and while approaching Seymour Narrows and being in all respects properly navigated, was in collision with the U.S.S. (Tanker) Roustabout. That at the time of said collision the U.S.S. Roustabout was a duly commissioned Naval vessel of the United States of America employed solely for Naval purposes as a regularly commissioned tanker of the United States Navy, operated by the Navy Department, and officered by commissioned officers of the United States

Navy and manned by a United States Navy crew, and armed with anti-aircraft guns and other armaments and ammunition for use in connection therewith. That the said U.S.S. Roustabout at the time of said collision was engaged in her aforesaid public employment and operated in connection with the prosecution of said war in the [14] military and Naval service of the United States of America in the transportation of military and Naval supplies, to wit, fuel oil, gasoline and other petroleum products, between military and naval bases on the West coast of the United States of America to military and Naval bases of the United States in the Territory of Alaska for use by combatant Naval vessels and aircraft of the United States of America; that said collision occurred as the result of the sole fault of said U.S.S. Roustabout in that the same was negligently and carelessly navigated by failing, as was her duty, to effect a port to port passage with said vessel Eastern Prince and struck said vessel Eastern Prince on her after port quarter.

#### IV.

That as a result of said collision said vessel Eastern Prince sustained substantial damage to her hull and equipment and was required to proceed to Campbell River and thence to Vancouver, British Columbia, for repairs and libelants incurred or paid charges necessarily incurred in respect thereof in the sum of \$12,301.11, all as more fully appears in the Statement of General and Particular Average prepared on behalf of libelants by W. E. Mor-

row & Company, Average Adjusters, a copy thereof being on file herein, marked Exhibit "B," and by this reference made a part hereof.

V.

That there is due and owing to libelants from respondent on said policy of insurance the sum of \$11,031.29, all as more fully appears from said Exhibit "B," and although demand accompanied by the submission of said Exhibit "B" was heretofore made on respondent for payment on the 11th day of September, 1942, respondent has refused to pay the same.

VI.

That as more fully appears in said Exhibit "B," libelants [15] have applied for remission of duty payable under United States Revised Statutes, Sec. 3114, and if such remission be not granted an additional ad valorem duty of 50 per cent on the cost of repairs performed on said vessel Eastern Prince will be payable and will be a proper claim against respondent.

VII.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of this court.

Wherefore, libelants pray that process in due form of law according to the practice of this court in causes of admiralty and maritime jurisdiction may issue against respondent, General Insurance Company of America, and that it be required to appear and answer upon oath, all and singular, the



matters aforesaid; that the court decree payment by respondent to libelants of the sum of \$11,031.29, with interest at six per cent from the 5th day of September, 1942, together with libelants' costs and disbursements herein to be taxed, and that the court retain jurisdiction for the purpose of ascertaining what further amount, if any, may be payable by respondent in connection with the ad valorem duty aforesaid, and that libelants may have such other and further relief in the premises as in law and in justice they may be entitled to receive.

BOGLE, BOGLE & GATES,  
STANLEY B. LONG,  
THOMAS L. MORROW,  
Proctors for Libelants. [16]

[Duly verified.]

[Endorsed]: Filed April 12, 1944. [17]

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[Title of District Court and Cause.]

### ORDER

This matter coming on to be heard on January 3, January 31, February 2 and May 6, 1944, upon respondent's exceptions to the libel likewise being taken to the amended libel by stipulation of the parties and so ordered by the Court on the 12th day of April, 1944, the said libelants appearing by and through their proctors, Messrs. Bogle, Bogle & Gates and Thomas L. Morrow, and the respondent appearing by and through its proctors, Skeel, Mc-



Kelvy, Henke, Evenson & Uhlmann, and the Court having heard oral argument and considered written briefs on file herein and being fully advised in the premises, now, therefore, it is

Ordered that said respondent's exceptions to the libel, as amended, be and the same are hereby overruled; and it is further.

Ordered that pages 3 and 4 of libelants' Exhibit B, purporting to be the statement of the master of the vessel Eastern Prince, be and the same is hereby ordered stricken; and it is further

Ordered that page 20 of said Exhibit B, purporting to be a letter from the owner's counsel, be and the same is hereby ordered stricken; and it is further

Ordered that respondent be allowed ten days in which to answer the amended libel on file herein.

To all of which respondent excepts and its exception is allowed.

Done in open Court this 26th day of June, 1944.

JOHN C. BOWEN,  
Judge.

Presented by:

THOMAS L. MORROW,  
Proctors for Libelants.

Approved as to form:

SKEEL, McKELVY, HENKE,  
EVENSON & UHLMANN,  
Proctors for Respondent.

By THOS. D. KELLY.

[Endorsed]: Filed June 26, 1944. [19]

[Title of District Court and Cause.]

### ANSWER OF RESPONDENT

Comes now the respondent above named, General Insurance Company of America, a corporation, and answering the amended libel of the libelants herein denies, admits and alleges as follows:

#### I.

Answering paragraph I of said amended libel, this respondent does not have sufficient information or knowledge to form a belief as to the truth or falsity thereof, and therefore denies the same.

#### II.

Answering paragraph II of said amended libel, the respondent admits the same.

#### III.

Answering paragraph III of said amended libel, the respondent admits that on May 11, 1942, and for some time prior thereto, a state of war existed between the United States of America and the Empire of Japan. That as to all other allegations in said paragraph contained, this respondent does not have sufficient information or knowledge to form a belief as to the truth or falsity thereof and, therefore, denies the same. [20]

#### IV.

Answering paragraph IV of said amended libel, this respondent does not have sufficient information or knowledge to form a belief as to the truth or falsity of any of the allegations therein contained, and, therefore, denies the same.

V.

Answering paragraph V of said amended libel, the respondent denies the same and each and every part thereof except that respondent admits that demand was made for payment as therein recited and that said payment was refused by respondent, and particularly denies that the respondent is indebted to the libelants or any of them in the sum of \$11,031.29 or in any sum whatsoever.

VI.

Answering paragraph VI of said amended libel, this respondent does not have sufficient information or knowledge to form a belief as to whether or not application for remission of duty payable to the United States has been made as therein recited and, therefore, denies the same, and the respondent expressly denies that if any such claim is disallowed it or any part thereof will be a proper claim against this respondent by the libelants or any of them.

VII.

Answering paragraph VII of said amended libel herein, the respondent admits the jurisdiction of the Court and denies any other allegations therein contained incorporating any prior statements made in said amended libel, all of which are answered as hereinabove recited. [21]

Wherefore, the respondent prays that the amended libel be dismissed and that the respondent

recover its costs and disbursements herein to be taxed according to law.

SKEEL, McKELVY, HENKE,  
EVENSON & UHLMANN,  
HARRY HENKE, JR.,  
Proctors for Respondent.

[Duly verified.]

[Endorsed]: Filed July 11, 1944. [22]

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[Title of District Court and Cause.]

STIPULATION OF FACTS RE AMOUNT  
OF LOSS

Without prejudice to the issue of whether or not the loss sustained by the libelants as a result of the collision between the Eastern Prince and the USS Roustabout on May 11, 1942, and the damages to said Eastern Prince as a result thereof, are within the coverage of respondent's war risk policy in evidence herein as Libelants' Exhibit 1, and without admission by respondent that such loss should be construed as liquidated damages, the above named libelants and respondent through their respective undersigned proctors of record, hereby stipulate and agree to the following facts as evidence in the above case, and waive further proof thereof, to wit:

1. That the "Statement of General and Particular Average Case of the SS 'Eastern Prince' " prepared by W. E. Morrow & Company, average ad-

justers, dated September 5, 1942, may be admitted in evidence in this cause as Libelants' Exhibit 5, insofar as the items of loss, damage and disbursements, and average computations therein recited are concerned, but excluding opinions of counsel as to liability and all extraneous matters not material to the recitals of loss, damage and disbursements, and computations [23] of the average adjustment.

2. That the fair value of the Eastern Prince in its damaged condition at Vancouver, British Columbia, on May 15, 1942, was the sum of \$29,375.39 (U. S.).

3. That the value of the cargo, including freight on board the Eastern Prince, on May 11, 1942, and at Vancouver, British Columbia May 15, 1942, was the sum of \$30,000 (U. S.).

4. That as a result of the collision between the Eastern Prince and the USS Roustabout in Discovery Passage, B. C., on May 11, 1942, and the damages sustained by the Eastern Prince as a consequence thereof, libelants incurred and paid reasonable and necessary charges and expenses (particular average) for repairs, towage, salvage and other services for and on behalf of the Eastern Prince in the amount of \$9,903.07 (U. S.) and reasonably expended the sum of \$179.27 (U. S.) for survey fees and expenses in connection with the repairs of said vessel, all as is more particularly shown and detailed in said "Statement of General and Particular Average" (Libelants' Exhibit 5).

5. That as a result of the collision between the

Eastern Prince and the USS Roustabout in Discovery Passage, B. C., May 11, 1942, and the damages sustained by the Eastern Prince as a consequence thereof, libelants incurred and paid reasonable general average charges and expenses for the benefit of said vessel and her cargo in the amount of \$1,918.08, all as is more particularly shown and detailed in said "Statement of General and Particular Average" (Libelants' Exhibit 5).

6. That the vessel's (Eastern Prince's) proportion of said general average expense is the sum of \$948.95 as is properly shown and computed in said "Statement of General and Particular [24] Average" (Libelants' Exhibit 5).

7. That the principal amount of libelants' loss and claim against respondent for particular and general average charges and disbursements occasioned by said collision and the damages resulting to the Eastern Prince in consequence thereof, is the sum alleged in the amended libel herein (paragraph V), to wit, the sum of \$11,031.29.

BOGLE, BOGLE & GATES,  
STANLEY B. LONG,  
THOS. L. MORROW,

Proctors for Libelants.

SKEEL, McKELVY, HENKE,  
EVENSON & UHLMANN,

/s/ HENRY HENKE, JR.,

Proctors for Respondent.



[Title of District Court and Cause.]

OPINION, FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

Libel by Henry O. Link, E. W. Elliott and O. L. Grimes to recover on war risk policy issued by respondent, General Insurance Company of America.

The testimony as to the nature of the cargo aboard the Roustabout at the time of the collision is rather indefinite. We learn, however, from the witnesses that during a period of time including the month of May, 1942, the Roustabout was engaged in the service of the United States Navy in transporting from Seattle and nearby bases to war bases in southeastern Alaska, petroleum products, bombs, ammunition and other dry cargo for the use of the Armed Forces in carrying on the prosecution of the war with Japan. Her operations also included transporting from Alaskan bases to bases in Seattle and vicinity, such freight as was offered by the Navy or Coast Guard consisting generally of empty containers, oil drums, empty acetylene and oxygen tanks, damaged airplane motors, damaged airplanes, trucks, automobiles, torpedo cases and defective ammunition. The collision out of which this controversy arose occurred about [26] 2:00 a.m. of May 11, 1942, off a place known to mariners as Campbell River Bluff opposite Campbell River which empties into Discovery Passage in Canadian waters.

Judge Bowen in ruling upon the exceptions to the libel (56 F. Supp. 275) carefully considered Ameri-

can and English cases on the questions here involved. He referred to *Queen Ins. Co. v. Globe Ins. Co.*, 263 U. S. 487, 44 S. Ct. 175, as holding that in deciding whether marine loss is covered by a war risk clause two principles are to be considered. One is that we "generally are to stop our inquiries with the cause nearest to the loss." The other is that for expediency and harmony in the marine insurance world, the American courts should follow the English courts' decisions. The *Queen* case arose out of a collision between merchant vessels in convoy and it was held that the loss could not be attributed to warlike operations.

The facts here are somewhat similar to those in *Board of Trade v. Hain Steamship Co., Ltd.*, English Commercial Cases, vol. 35, p. 29 (1929) A. C. 534, the facts in that case being as follows:

"The respondents were the owners of a steamship, the *Trevanion*, which during the War was requisitioned by the Crown under the terms of the charterparty T. 99, by which the Crown accepted responsibility for loss or damage which was the consequence of hostilities or warlike operations. On the night of December 25, 1918, after the Armistice had been concluded, the *Trevanion* was in collision with an American steamer, the *Roanoke*, the collision being due to the negligence of both vessels. At the time of the collision the *Trevanion* was admittedly not engaged in a warlike operation. The respondents claimed damages from the Crown, and their claim was referred to arbitration. The arbitrator found as a fact that the *Roanoke* was engaged in a war-

like operation at the time of the collision and that, although both vessels had been negligent, the respondents were entitled to recover on the ground that the damage was the result of a warlike operation. On appeal by special case Rowlatt J. reversed the decision of the arbitrator, but his decision was reversed on appeal to the Court of Appeal." The Crown appealed to the House of Lords where the appeal was dismissed, the holding being that the collision was the consequence of a warlike operation.

In *Yorkshire Dale Steamship Co., Ltd., v. Minister* [27] of War Transport, *The Times Law Reports*, June 5, 1942, p. 263, referred to by Judge Bowen as *The Coxwold Case*, Lord Porter reviewed English cases saying:

"(1) In this as in every other insurance problem the proximate cause is alone to be looked at. *Ionides v. Universal Marine Insurance Company*, (1863) 14 C.B.N.S. 259. (2) But the proximate cause is not necessarily the nearest in point of time; it is the dominant cause. *Leyland Steamship Company, Limited, v. Norwich Union Fire Insurance Society* (34 *The Times L. R.* 221; (1918) A.C. 350), *Samuel v. Dumas* (40 *The Times L. R.* 375; (1924) A.C. 431). (3) In the case of a ship proceeding on a voyage which is not itself a warlike operation, absence of lights, sailing in convoy, and zigzagging are not separately or in combination a warlike operation, nor indeed is it a warlike operation to follow the course set by the naval officer in charge of the convoy. *The Petersham and the Matiana* (36 *The Times L. R.* 791; (1921) 1 A.C. 99). (4) The dimming or

extinguishing of a shore light is a warlike operation, but if a ship engaged in a mercantile operation goes ashore because she is out of her reckoning, she is not lost by the warlike operation merely because she would most probably have realized and avoided the danger had the light been seen. *Ionides v. Universal Marine Insurance Company* (supra). (5) A ship carrying war stores from one war base to another is engaged on a warlike operation. *The Geelong* (39 *The Times L. R.* 133; (1923) *A. C.* 191). (6) A collision caused by a ship so engaged is caused by the warlike operation. *Attorney-General v. Ard Coasters* (37 *The Times L. R.* 692; (1921) 2 *A.C.* 141). (7) A collision solely caused by a ship engaged on a mercantile adventure is not caused by a warlike operation even though that ship collides with or is struck by one engaged on a warlike operation. *The Clan Matheson* (45 *The Times L. R.* 408; (1929) *A.C.* 514). (8) If the collision be caused both by the ship so engaged and by one not so engaged so that both were effective causes of the disaster the consequent loss is due to the warlike operation. *Board of Trade v. Hain Steamship Company* (45 *The Times L. R.* 550; (1929) *A.C.* 534). (9) The collision if due in whole or in part to the action of the ship engaged in a warlike operation does not cease to be caused by the warlike operation by reason of the fact that that action is negligent. *The Warilda* (39 *The Times L. R.* 333; (1923) *A.C.* 292)."

The concluding remarks of Lord Porter in the *Coxwold* case illustrate the principles which distin-

guish this case from the Queen Insurance and other cases cited by respondent. He summarized as follows:

“If the Coxwold had been on an ordinary mercantile voyage no doubt, as a result of the decisions in your Lordships’ House, the risk would be a marine one, whether its cause was absence of lights, or sailing in convoy, or obeying the orders of the Commodore vessel, or inability to see the Neist Light because it was dimmed. But in the circumstances the case of the Coxwold being at that place at that time in those conditions was her warlike operation and the loss was in my view not only in the course of but caused by that operation. [28]

“That the Court of Appeal thought otherwise was, I venture to suggest, due to the importance which they attached to the arbitrator’s finding as to the set of the tide as against the totality of circumstances on which he relied. Moreover, in my view, they did not give sufficient weight to the fact, as admitted and found, that the warlike operation consisted in sailing from one war base to another.”

At the time of the collision with the Eastern Prince and for some time prior thereto and thereafter, the Roustabout was a commissioned vessel in the United States Navy officered and manned with naval personnel. At no time during this period was she engaged in carrying commercial cargo. The Roustabout’s operations and character differ from those of the Napoli of the Queen Insurance case and some of the other cases involving merchant ships.



Here the evidence shows the usual cargo carried by the Roustabout in both directions between Seattle and the Alaskan war bases. The fact that an officer and member of the crew testified that they could not specifically describe the cargo aboard the vessel at the time of the collision seems of little consequence. We have but little, if any, evidence describing the cargo aboard the Roustabout at the time of the collision but we are informed as to the nature of the cargo generally carried by the Roustabout on her return trips from Alaskan bases to Seattle. Considering the facts established by the evidence here as similar facts were considered in the Roanoke case (*Board of Trade v. Hain Steamship Co., Ltd.*, *supra*), we have no right in law or in fact to assume without evidence that the Roustabout was not engaged on the duty of the service of which she formed part of the Navy.

The collision of the vessels Roustabout and Eastern Prince was due in part to the action of the Roustabout in a warlike operation. The damage to insureds' vessel, Eastern Prince, was a consequence of warlike operations of the [29] Roustabout, a duly commissioned vessel of the United States Navy officered and manned by naval officers and crew and operated by the Navy in aid of the prosecution of the war with Japan. The collision was a result of mutual fault of both vessels.

The Court, having heard the testimony and having examined the proofs offered by the respective parties, and the cause having been submitted for decision, Now Finds the Facts and States Conclusions of Law as Follows:



## FINDINGS OF FACT

1. That libelants, Henry O. Link and E. W. Elliott, are now and at all times herein mentioned were respectively the owner and bareboat charterer of the vessel called the *Eastern Prince*.

2. That respondent, General Insurance Company of America, is a corporation organized and existing under and by virtue of the laws of the State of Washington with its principal place of business in the Western District of Washington, Northern Division, and is authorized and licensed to make insurance contracts, including the insurance herein-after referred to. That on May 4, 1942, respondent in consideration of an agreed premium paid therefor, issued its certain policy of insurance, No. MWR 1151, to libelants, wherein and whereby respondent insured libelants and the United States of America and agreed to assume and pay all loss or damage resulting to libelants and said vessel as a result of said vessel being in collision, together with general average, salvage and special charges and sue and labor expense incident thereto, consequent upon hostilities or warlike operations (loss payable to O. L. Grimes).

3. That on May 11, 1942, and for some time prior [30] thereto, a state of war existed between the United States of America and the Empire of Japan and on said date, while said vessel, the *Eastern Prince*, was proceeding on a voyage from the Port of Seattle, Washington, to Prince Rupert, first port of call, with supplies and equipment for the Alaska Road up the inside passage to Alaska for the Elliott

Steamship Company, and while off Campbell River Bluff opposite Campbell River was in collision with the United States tanker Roustabout; that at the time of said collision the USS Roustabout was a duly commissioned naval vessel of the United States of America employed solely for naval purposes as a regularly commissioned tanker of the United States Navy Department and officered by commissioned officers of the United States Navy and manned by a United States Navy crew, and armed with anti-aircraft guns and other armaments and ammunition for use in connection therewith. That the USS Roustabout at the time of said collision was engaged in her aforesaid public employment and operated in connection with the prosecution of said war in the military and naval service of the United States of America in the transportation of military and naval supplies, to-wit, fuel oil, gasoline and other petroleum products, between military and naval bases on the west coast of the United States of America to military and naval bases of the United States in the Territory of Alaska for use by combatant naval vessels and aircraft of the United States of America; and that on southbound trips from said naval bases in the Territory of Alaska, the said USS Roustabout engaged in carrying cargo consisting of freight offered by the Navy or Coast Guard, empty containers, oil drums, empty acetylene and oxygen tanks, damaged airplane motors, damaged airplanes, trucks and automobiles, and at the time of said collision, the [31] said vessel

had aboard water ballast and miscellaneous dry cargo of the nature just above described.

4. That the site of the collision is a narrow channel under the International Rules.

5. That at the time of said collision the USS Roustabout was at fault as follows:

(a) Failing to keep to the right of the channel;

(b) Failing within sight of the Eastern Prince to indicate a change of course on her whistle;

(c) Failing to keep a proper lookout in that the lookout aboard the Roustabout after sighting the red light of the Eastern Prince took no action concerning same and failed to notify the officer on the bridge of the whereabouts of the Eastern Prince.

6. That at the time of said collision the SS Eastern Prince was at fault as follows:

(a) Failure to exhibit red and green navigation lights, view of the same being obstructed by deck load consisting of construction material, lumber, etc.

7. That libelants suffered loss for particular and general average charges and disbursements occasioned by said collision and the damages resulting to the Eastern Prince in consequence thereof in the sum of \$11,031.29.

## CONCLUSIONS OF LAW

From the foregoing facts the Court decides:

1. That at the time of the collision between the USS Roustabout and libelants' vessel, Eastern Prince, the Roustabout was a duly commissioned naval vessel of the United States employed solely for naval tanker purposes, officered and manned by naval officers and crew and operated by the United

States Navy and engaged in warlike operations.

2. That the collision and damage resulting therefrom to libelants' vessel, Eastern Prince, was a consequence of Roustabout's warlike operations.

3. That the said collision occurred by reason of the [32] mutual fault of both vessels.

4. That libelants are entitled to judgment against respondent in the sum of \$11,031.29 together with costs and disbursements.

Let Judgment Be Entered Accordingly.

Dated this 24th day of February, 1948.

ROGER T. FOLEY,

United States District Judge.

[Endorsed]: Filed Feb. 27, 1948. [33]

In the District Court of the United States for the  
Western District of Washington, Northern  
Division

In Admiralty—No. 14378

HENRY O. LINK, E. W. ELLIOTT  
and O. L. GRIMES,

Libelants,

vs.

GENERAL INSURANCE COMPANY OF  
AMERICA, a corporation,

Respondent.

### FINAL DECREE

This cause having come on for trial July 16, 1947, upon the pleadings and suit, and libelants being represented by its proctors, Bogle, Bogle & Gates, Stanley B. Long and Thomas L. Morrow, and respondent being represented by its proctors, Skeel, McKelvy, Henke, Evanson & Uhlmann and Harry Henke, Jr., and witnesses for the parties having been sworn and having testified in open court, and exhibits having been offered and admitted as evidence, and the court being fully advised and having considered all thereof, after oral argument, and having rendered its oral opinion herein and entered its findings of fact and conclusions of law on the 24th day of February, 1948 pursuant to Supreme Court Admiralty Rule 46½; now, therefore, on motion of proctors for libelants, it is hereby

Ordered, adjudged and decreed, that the libelants

recover of and from respondent, General Insurance Company of America, the sum of \$11,031.29 with interest thereon at six percent (6%) from the 11th day of September, 1942, together with libelants' costs in the sum of \$93.70, and it is here further

Ordered, adjudged and decreed that unless this decree be satisfied, or proceedings thereon stayed by an appeal within ten days after entry of this decree with notice of entry on the respondent or its proctors, the libelants have execution against the [34] respondent and his stipulator for costs, gifts, chattels, land, forthwith to satisfy this decree.

Done in open court this 17th day of May, 1948.

/s/ ROGER T. FOLEY,  
Judge.

Approved as to form:

SKEEL, McKELVY, HENKE,  
EVENSON & UHLMANN,  
By /s/ DONALD S. VOORHEES,  
Proctors for Respondent.  
BOGLE, BOGLE & GATES,  
By THOMAS L. MORROW,  
Proctors for Libelants.

Presented by:

THOMAS L. MORROW,  
of Bogle, Bogle & Gates,  
Proctors for Libelants.

(Entered on Admiralty Docket May 20, 1948.)

[Endorsed]: Filed May 20, 1948. [35]



[Title of District Court and Cause.]

PETITION FOR APPEAL

To the Honorable Judge of the District Court of  
the United States for the Western District of  
Washington, Northern Division:

Your petitioner, who is the respondent in the  
above entitled cause, prays that it may be permitted  
to take an appeal from the final decree entered in  
the above cause on the 20th day of May, 1948, to  
the United States Circuit Court of Appeals for the  
Ninth Circuit for the reasons specified in the As-  
signment of Errors which is filed herewith.

Your petitioner further prays that said appeal  
shall operate as a supersedeas, and therefore prays  
that an order be made fixing the amount of security  
which said respondent shall give and furnish upon  
such appeal, and that upon giving such security all  
further proceedings in this court be suspended and  
stayed until the determination of said appeal by  
the United States Circuit Court of Appeals for the  
Ninth Circuit.

SKEEL, McKELVY, HENKE,  
EVENSON & UHLMANN,

By /s/ HARRY HENKE, JR.,  
Attorneys for Respondent.

[Endorsed]: Filed June 22, 1948. [36]

[Title of District Court and Cause.]

### ASSIGNMENT OF ERRORS

Comes now the said General Insurance Company of America, respondent in the above entitled cause, and filed the following assignment of errors, upon which it will rely in the prosecution of appeal herewith petitioned for in said cause from the decree of this court entered on the 20th day of May, 1948:

1. The court erred in its conclusion of law that the USS Roustabout was engaged in warlike operations at the time of its collision with libelants' vessel, the MV Eastern Prince.

2. The court erred in its conclusion of law that the collision and damage resulting therefrom to libelants' vessel, the MV Eastern Prince, was a consequence of warlike operations of the USS Roustabout.

3. The court erred in its conclusion of law that the collision between the MV Eastern Prince and the USS Roustabout was one within the coverage of the "war risk" policy of insurance issued by the respondent upon the MV Eastern Prince and that libelants were entitled to judgment against respondent upon that policy of insurance.

4. The court erred in its conclusion of law that at the time of the collision the USS Roustabout was employed solely [37] for naval tanker purposes.

5. The court erred in its finding that at the time of the collision the USS Roustabout had aboard dry cargo of the nature of empty containers, oil drums, empty acetylene and oxygen tanks, damaged

airplane motors, damaged airplanes, trucks and automobiles.

6. The court erred in finding that at the time of said collision the USS Roustabout and the MV Eastern Prince were both at fault.

7. The court erred in finding that the said collision occurred by reason of the mutual fault of both vessels.

8. The court erred in granting to libelants interest upon their judgment from the 11th day of September, 1942, rather than from the date of entry of the final decree in this cause.

9. The court erred in overruling respondent's exception to the sufficiency of the libel and in holding that the amended libel stated a cause of action.

Wherefore, on account of the errors hereinabove assigned, petitioner prays that the said decree of the District Court of the United States for the Western District of Washington, Northern Division, entered on the 20th day of May, 1948, in the above entitled cause, be reversed, and that a decree be entered in favor of the respondent.

SKEEL, McKELVY, HENKE,  
EVENSON & UHLMANN,

By /s/ HARRY HENKE, JR.,  
Attorneys for Respondent.

[Endorsed]: Filed June 22, 1948. [38]

[Title of District Court and Cause.]

### ORDER ALLOWING APPEAL

The petition of respondent in the above-entitled cause for an appeal from the final decree entered therein is hereby granted and the appeal is allowed; and upon petitioner filing a bond in the sum of Twenty-five Thousand (\$25,000.00) Dollars with sufficient sureties, and conditioned as required by law, the same shall operate as a supersedeas of the decree made and entered in the above cause, and shall suspend and stay all further proceedings in this court until the determination of said appeal by the United States Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 25th day of June, 1948.

ROGER T. FOLEY,  
United States District Judge.

[Endorsed]: Filed June 30, 1948 [39]

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[Title of District Court and Cause.]

### COST AND SUPERSEDEAS BOND

Know all men by these presents:

That we, General Insurance Company of America, a corporation, and General Casualty Company

of America, a corporation authorized to act as sole corporate surety under the laws of the State of Washington, are held and firmly bound unto Henry O. Link, E. W. Elliott and O. L. Grimes, libelants above named, in the sum of Twenty-five Thousand (\$25,000.00) Dollars, lawful money of the United States, to be paid to the said Henry O. Link, E. W. Elliott and O. L. Grimes, their executors, administrators and successors, to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and each of our successors and assigns by these presents.

Sealed with our seals and dated this 30th day of **June, 1948.**

Whereas, the above-named General Insurance Company of America has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment of the United States District Court for the Western District of Washington, Northern Division, in the above-entitled [40] cause in favor of libelants and against respondent in the sum of Eleven Thousand Thirty-One and 29/100 (\$11,031.29) Dollars, together with costs;

Now therefore, the condition of this obligation is such that if the above-named General Insurance Company of America shall prosecute its said appeal to effect and answer all costs and damages, and pay the judgment of the District Court, if it fail to

make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

GENERAL INSURANCE  
COMPANY OF AMERICA,

By RALPH H. BALDWIN,  
Vice President.

(Seal)            H. W. EWART,  
Assistant Secretary.

GENERAL CASUALTY  
OF AMERICA,

(Seal)            By ANTONY PANELLA,  
Attorney-in-Fact.

Approved and presented by:

SKEEL, McKELVY, HENKE,  
EVENSON & UHLMANN,

By DONALD S. VORHEES.

The foregoing bond is hereby approved this 8th day of July, 1948.

JOHN C. BOWEN,  
Judge.

[Endorsed]: Filed July 8, 1948. [41]

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[Title of District Court and Cause.]

STIPULATION AUTHORIZING TRANSMIT-  
TAL OF ORIGINAL EXHIBITS

It is hereby stipulated and agreed by and between Henry O. Link, E. W. Elliott and O. L. Grimes,



libelants in the above entitled action, by and through their proctors, Bogle, Bogle & Gates, and General Insurance Company of America, a corporation, by and through its proctors, Skeel, McKelvy, Henke, Evenson & Uhlmann, that the original exhibits introduced at the trial of the above entitled action shall be included in the apostles on appeal but shall not be printed as part of the printed apostles on appeal.

BOGLE, BOGLE & GATES,

THOMAS L. MORROW,

Proctors for Libelants.

SKEEL, McKELVY, HENKE,

EVENSON & UHLMANN,

HARRY HENKE, JR.,

Proctors for Respondent.

It is so ordered.

Done in open court this 22nd day of July, 1948.

JOHN C. BOWEN,

Judge.

[Endorsed]: Filed July 22, 1948. [42]

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[Title of District Court and Cause.]

APPELLANTS' DESIGNATION OF CON-  
TENTS OF APOSTLES ON APPEAL

Come now the appellants and hereby designate the following portions of the record to be included in the apostles on appeal:

1. The style of the court.
2. The names of the parties.
3. The libel together with the exhibits annexed thereto.

4. Exceptions of respondent to libel (peremptory).

5. Stipulation granting leave to libelants to file an amended libel.

6. Amended libel.

7. Order of June 26, 1944, overruling respondent's exceptions to the amended libel.

8. Answer of respondent.

9. The testimony as taken on the part of the libelant and any exhibits annexed thereto.

10. The testimony as taken on the part of the respondent and any exhibits annexed thereto.

11. Stipulation of facts re amount of loss.

12. Opinion, Findings of Fact, and Conclusions of Law.

13. Final decree [43]

14. Petition for appeal.

15. Assignment of errors.

16. Order allowing appeal.

17. Citation.

18. Supersedeas bond.

19. Appellants' designation of contents of apostles on appeal.

Dated at Seattle, Washington, this 12th day of July, 1948.

SKEEL, McKELVY, HENKE,  
EVENSON & UHLMANN,  
By HARRY HENKE, JR.,  
Attorneys for Appellants.

(Acknowledgment of Service.)

[Endorsed]: Filed July 13, 1948. [44]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO APOSTLES  
ON APPEAL

United States of America,  
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing type-written transcript of record, consisting of pages number 1 to 44, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by Designation of Counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle and that the same together with the Reporter's Transcripts of Proceedings and Testimony, the originals of which are sent up as part of this record, together with the original exhibits which are certified under separate certificate, constitute the apostles on appeal from the Decree of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges [45] incurred in my office for preparing record on appeal in this cause, to-wit: 3 pages at 40c, \$1.20; 40 pages at 10c, \$4.00; Notice of Appeal, \$5.00; total, \$10.20.

I further certify that the above amount has been paid to me by the attorneys for the Appellant.

I further certify that there is attached to the apostles the original Citation on Appeal issued by this Court.

In witness whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District this 28th day of July, 1948.

(Seal)                      MILLARD P. THOMAS,  
Clerk,

By /s/ TRUMAN EGGER,  
Chief Deputy. [46]

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[Title of District Court and Cause.]

CITATION

United States of America—ss.

To: Henry O. Link, E. W. Elliott, and O. L. Grimes,  
Greetings:

You and each of you are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit within forty (40) days from the date hereof pursuant to an order allowing an appeal from the District Court of the United States for the Western District of Washington, Northern Division, in a suit wherein the General Insurance Company of America is appellant, and you are appellees, to show cause, if any there be, why the final decree rendered against said General Insurance Company of America should not be corrected, and why speedy justice should not be done to the parties on that behalf.

Witness the Honorable Roger T. Foley, judge of the District Court of the United States, this 25th day of June, 1948, and in the 172nd year of the independence of the United States of America.

(Seal)            /s/ ROGER T. FOLEY,

Judge of the District Court for the Western District of Washington, Northern Division.

[Endorsed]: Filed June 30, 1948. [47]

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[Title of District Court and Cause.]

### AFFIDAVIT OF SERVICE

State of Washington,  
County of King—ss.

Donald S. Voorhees, being first duly sworn, on oath deposes and states: That during all times herein mentioned he was and now is a citizen of the United States and a resident of the State of Washington and over the age of 21 years; that he is not a party to the above-entitled action, nor interested therein; and that he is competent to be a witness in this cause.

Affiant states that on the 8th day of July, 1948, affiant served the libelants with a copy of the citation in the above-entitled action, leaving a copy of the said citation in the hands of Thomas L. Morrow,

one of the proctors for libelants, in the offices of Bogle, Bogle and Gates, proctors for libelants.

Further affiant sayeth not.

/s/ DONALD S. VOORHEES.

Subscribed and sworn to before me this 9th day of July, 1948.

(Seal)      /s/ A. P. CURRY,

Notary Public in and for the State of Washington,  
residing at Seattle.

[Endorsed]: Filed July 27, 1948. [48]

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In the District Court of the United States for  
the Western District of Washington, Northern  
Division

In Admiralty—No. 14378

HENRY O. LINK, E. W. ELLIOTT, and O. L.  
GRIMES,

Libelants,

vs.

GENERAL INSURANCE COMPANY OF  
AMERICA, a corporation,

Respondent.

TRANSCRIPT OF PROCEEDINGS AT TRIAL

Before: The Honorable John C. Bowen, District  
Judge.

Seattle, Washington

July 16th, 1947, 10:00 a.m.

Appearances: Stanley B. Long, Esq., and Thomas  
L. Morrow, Esq. (Messrs. Bogle, Bogle & Gates,



Seattle, Washington), appearing as Proctors for Libelants; Harry Henke, Jr., Esq. (Messrs. Skeel, McKelvy, Henke, Evenson & Uhlmann, Seattle, Washington), appearing [1\*] as Proctors for Respondent.

Whereupon, evidence was given and proceedings were had as follows, to wit: [2]

The Court: The case of Henry O. Link, E. W. Elliott, and O. L. Grimes versus General Insurance Company; are you ready for trial?

Mr. Long: All parties are ready, your Honor.

Mr. Henke: Ready.

Mr. Long: I should like to hand the Court the Libelants' Trial Memorandum, a copy of which has been served upon counsel for the respondent.

Mr. Henke: We have a trial memorandum which will be here very shortly, your Honor.

The Court: Thank you.

Mr. Long: It might be helpful to the Court if I would make a brief opening statement. I don't feel it will be necessary to go into any particular detail but it would help, I believe, to acquaint the Court with the issue and the problem involved in this case.

I may say that this is a companion case, if your Honor please, to the case which your Honor tried yesterday, that case being entitled Henry O. Link and others versus the United States of America. In other words, the issues arise out of the same

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\* Page numbering appearing at foot of page of original certified Reporter's Transcript.

collision between the USS Roustabout, a Naval vessel, and the Motor Vessel Eastern Prince. So that the collision which occurred between those two vessels on [3] May 11th, 1942, is what gives rise to both cases—the one your Honor heard yesterday and the case which is now before your Honor this morning.

This case, if your Honor please, is an action brought by Mr. Link, Mr. Elliott, and Mr. Grimes as assureds under a certain war risk policy covering the Motor Vessel Eastern Prince, issued by the respondent General Insurance Company of America and in effect and in full force at the time of the collision on May 11th, 1942. The basic question in the case is as to whether or not the damage suffered by the Eastern Prince—the vessel insured under the policy—is damage of such a character and occasioned by risks covered under the war risk policy issued by the respondent.

The issuance of the policy, a copy of which is attached to the libel, is admitted by the respondent in Paragraph 2 of their Answer to Paragraph 2 of the Amended Libel. The original policy will be introduced in evidence.

This case, if I might say so, your Honor, is rather unique in this: The libelants regard the law of the case as being settled; and that arose in this fashion. The allegations of the Amended Libel were excepted to by the respondent as being insufficient to state a cause of action. Voluminous briefs were filed with Judge Bowen and the matter was argued

on two or more occasions at great length; and on May 31st, 1942, Judge Bowen filed a carefully prepared written opinion which in our view is the law of the case in so far as the war risk question is concerned. In our memorandum which I have just handed to your Honor we point that out. The Court will find the rather voluminous briefs where were filed on the question of the libel as to its sufficiency. When I refer to libel, I mean amended libel all the way through.

The libelants take the position that the law of the case having been established in Judge Bowen's opinion in this case, duly reported in the various reports, including the English Reports, our burden here is to prove the allegations of the libel, which, of course, Judge Bowen assumed as true in testing the sufficiency of the cause of action stated in the libel. We are prepared to do that.

Our proof will show, briefly, that the USS Roustabout was a Navy tanker duly commissioned as a Naval vessel, armed with appropriate armament, manned with official naval personnel, officers, and enlisted men and was engaged at the time here material in a [5] shuttle service between war bases in Seattle and war bases in the Territory of Alaska at which the war activity was very pronounced.

The function of the vessel was to carry in her tanks—she being a tanker vessel, petroleum products belonging to the United States Navy from naval stores and tanks at Seattle, a war base, to

war bases in the Territory of Alaska—Sitka, a large Naval Airfield; Juneau, Ketchikan, Port Al-phort, Port Alexander, and other places which the witnesses will name; all of which were active war bases in the prosecution of the war against Japan at that time.

The testimony will show that there was enemy action at or near these bases, both before the war and thereafter. It was the duty of this vessel in shuttle service to transport, as I say, petroleum products for the use of the Armed Forces—by that I mean the Navy—in Alaska, as well as munitions, bombs, and other war materials in her dry-cargo hold; in other words, this vessel was primarily a tanker but she did have a dry-cargo hold. I have forgotten the capacity—I think somewhere around 200 or 300 tons, or thereabouts.

In connection with her shuttle service she [6] would transport southbound—coming southbound to pick up another load of war munitions to again take to Alaska—she would then take southbound damaged airplane parts belonging to the Navy, torpedo cases, ammunition cases, empty drums which were being brought back for refilling with aviation gasoline. So that in this shuttle service she was serving the combatant forces of the United States Navy and Coast Guard in the transportation of petroleum products and munitions northbound and other Navy munitions southbound for either refilling or repair.

Having established with that evidence the charac-

ter of the vessel as a war vessel—and the testimony will show that she was a duly commissioned war vessel, the same as the Carrier Lexington or anything else. She was a duly commissioned vessel, used for the furtherance and prosecution of the war in the Territory of Alaska.

The only other issue, as we see it—and I may say that under Judge Bowen's opinion he did find the Roustabout to be a war vessel, and the claim was properly one under war risk policy. It is necessary, however, for us to prove that the collision itself occurred either by reason of the sole fault of the USS Roustabout or the mutual faults of both vessels. [7] Legally, in so far as the war risk problem is concerned, it makes no difference whether the collision occurred by reason of the sole fault of the Roustabout or the mutual fault of both vessels.

I believe in the case tried before your Honor, yesterday, the mutual fault was stipulated, so that the question was out. We shall undertake to prove it, however, in this case.

The proof, I may say, very briefly, will shape up in this fashion:

The site of the collision between these two vessels which occurred somewhere around 2:00 a.m. on May 11th, 1942, was in a body of water located in British Columbia known as Discovery Passage. It is a body of water bounded on the one side by Vancouver Island and the mainland and numerous islands on the other side; and it varies in width from three-quarters of a mile to a mile, and is what the Rules of the Road—we shall contend—characterize as a narrow channel.



The channel runs generally in a northerly and southerly direction. The Roustabout was proceeding southbound in a general southerly direction. The Eastern Prince was progressly toward Alaska in a generally northerly route. We shall contend that the [8] point of collision was on the left or east side of mid-channel, in so far as the Roustabout was concerned, and that she violated the Article in reference to the narrow channel rule by failing to keep on her right or starboard side of mid-channel. That may be likened somewhat to the driving of a car; you stay on your right side of the road, which obtains under the Narrow Channel Rule.

Secondly, we shall contend that the Roustabout was at fault in failing to sound the appropriate whistle signals, under the International Rules, upon alteration of her course after the vessels were in sight of each other. Both of those faults are what is known, your Honor, as so-called statutory faults.

We shall also contend that the Roustabout was at fault in failing to pass port to port as required by the rules.

Having established the character of the USS Roustabout as a war vessel within the meaning of the decision, and that either sole fault on the part of the Roustabout or mutual fault—it makes no difference in the ultimate determination of this case which the court may find—we will feel then that we shall be entitled to recover as prayed for in the libel.

The question of damages as alleged in the libel I believe will be covered by stipulation which we can report to your Honor later during the trial. I have no doubt that that factor or phase of the matter will



be agreed upon by counsel and stipulated into the record, thus avoiding the necessity of proof. I believe that that generally covers the problem.

This case I may say, your Honor, is of particular interest in as much as it is virtually the only case or at least the first case to grow out of this very interesting war marine risk question in the past war, World War II. Judge Bowen's opinion has been published in the English Reports and is a matter of particular interest to the marine insurance fraternity.

We feel, as I previously indicated, that the decision of Judge Bowen is the law of the case. It hasn't been overruled by any other case. It hasn't been distinguished by any other case, to my knowledge.

Most of our law, as the Court will observe from the reading of the briefs, applicable to this question, arises in the English courts—the House of Lords and the lower courts of England. Mr. Justice Holmes, in a rather famous case, *Queen Insurance Company*, [10] says that there is good for the American courts following the English courts in this field of marine insurance. Judge Bowen also indicates that in his opinion and does follow the English decisions in deciding the legal questions here involved.

I think, your Honor, that briefly covers the subject. I hope it will shed some light on the general issue here.

The Court: Did you care to make an opening statement?

Mr. Henke: If your Honor please, the record in this case will show that the Roustabout is not a battleship, as counsel has attempted here to you, but is a small tanker which was originally known as the Hawaiian Standard. She was employed by the Standard Oil Company in the transportation of petroleum products between various islands of the Hawaiian group.

Some time approximately upon our entry into the war the vessel was requisitioned by the appropriate government agency and was converted to use as a tanker manned by a Navy crew and operating out of Seattle, Washington. Its duties were the routine ones of carrying various petroleum products to various [11] stations which existed in southeastern Alaska. The vessel carried no more armament than was carried by the ordinary Liberty or vessels of similar type which were operating in these waters. It was in effect a primarily merchant vessel but was operated by the Navy in carrying out the general program of the Navy.

The record will show that the vessel was commanded, as a matter of fact, by a very competent captain who had spent the greater part of his life navigating the southeastern Alaska waters. His status was not very much different than that of the ship he commanded. He had commanded various other vessels which were operated by the Alaska Transportation Company from Seattle to these same ports in southeastern Alaska. When the war came, he put on a Navy uniform where previously he had

worn the civilian uniform of the Alaska Transportation Company, and proceeded to navigate in the same waters.

The record will further show that at the time that this accident occurred there was no blackout, no restrictions of any kind so far as navigation was concerned. The shore navigating aids were all functioning all along the Coast in the same manner as before the war. The vessels carried all of their lights. As a matter of fact, the record will show that one of the issues in the case, so far as negligence is concerned, is that the Eastern Prince had too many lights on her—not only enough lights but more than she should have had.

The circumstances are very simple, so far as the setting is concerned. You will probably, before deciding this case, read various of the war risk cases and practically all of them of course involve some phase of actual war operations, in the sense that there is some war risk involved; that the vessels are operating under circumstances without lights, under convoys, under direction of naval officers, or the naval vessel is engaged in some naval maneuver or operation.

In this case I think your Honor will be impressed with the fact that the circumstances are such as would occur in an ordinary marine accident which would occur out in the same waters today. The same accident could occur on the same waters today without the slightest difference. The circumstances would be entirely the same.

Referring to the law of the case, Counsel has referred to Judge Bowen's decision. Of course, Judge Bowen's decision was upon what was in effect [13] our demurrer to their libel. As Counsel states, it was argued at considerable length and the Court, after considerable consideration, finally concluded in his decision that the libel, as recited, stated a cause of action. But, of course, the fact that the court decided that their libel stated a cause of action and permitted them to come into court does not mean that the law is decided or that the facts are decided as Counsel's statement would imply. It is our opinion that Judge Bowen's decision did nothing more than to decide that in his opinion the libel which they had filed was sufficient to keep them in court. He did not decide that they had a case or that they were entitled to recover and I am sure he would be the last one in the world to make such a suggestion. We consequently will desire to present the law to you in complete detail.

As Counsel has suggested, it is the rule of the cases which are recited in these various briefs that when there is a collision between what is designated as a warship and a merchant vessel, the accident will be considered as a war risk loss if the accident is the result of the action of the warship—the negligent operation of the warship or in effect the accident is contributed to by the [14] negligent operation of the warship. We do not concede in this case that there was any negligence on the part of the warship or that anything which it did contrib-

uted to the accident as such; and we do not further concede in this case in the slightest that the vessel involved, the Roustabout, was to be classified as a warship or classified as engaged in a war activity at the time of her collision.

The record will show, as a matter of fact, that the Roustabout had at the time of the collision delivered a cargo of various types of petroleum products to Sitka, Alaska, which is in southeastern Alaska; and had merely gone up there, pumped her petroleum products out, and delivered those few items of dry cargo which she carried, probably taken on a few empty oil drums and taken on water for ballast and was returning to Seattle in that condition. In other words, you will find that she had on board only the water ballast to keep her floating properly in the water and little dry cargo in the way of empty drums and that was the entire cargo of the vessel returning to Seattle.

In other words, at that time she had no war supplies of any kind on board which would be a serious factor. She was doing in effect the type of work which any other vessel doing work of that type would be engaged in.

So that is our view that the Roustabout is not a warship—was never a warship; that under the circumstances of the accident the conditions were such that they should never be construed as circumstances creating a liability under a war risk policy.

I am sure that your Honor, when you have heard the facts of the case, will concur that the cir-



cumstances are not such as to suggest the possibility of war risk in the sense of there being anything which the war in effect was a factor toward contributing to the loss of the *Eastern Prince* and that this is properly a loss which would fall upon the marine underwriters rather than on the war risk underwriters.

Mr. Long: Mr. Henke, it is my understanding that you are prepared to admit the allegations of paragraph I of the Amended Libel with reference to the ownership of the vessel and so forth?

You might examine that.

Mr. Henke: I was just trying to find my copy of the Amended Libel. Just one second.

Yes, we are willing to stipulate that Henry O. Link is the owner of the *Eastern Prince*; that E. W. Elliott was at the time the bareboat charterer; and [16] that the loss payable clause of the policy recited that the payment be made to O. L. Grimes, which is the allegation of your Paragraph 1.

Mr. Long: Very good.

Mr. Henke, are you also prepared to stipulate that no other person has any interest in this recovery except those named as the parties libelant?

Mr. Henke: Why is that allegation material to your case?

Mr. Long: The reason for it is that technically the United States of America is named as a charterer. It isn't, as a matter of fact. I can assure you at least that the United States has no interest



in this recovery,—only those persons named as libelants.

Mr. Henke: Yes; for that purpose we will so stipulate.

Mr. Long: The libelants, Link, Elliott and Grimes, are the only persons having any interests of recovery in this case.

Mr. Henke: That is right.

Mr. Long: I would like marked as Libelants' Exhibit 1 the document which is the policy here sued upon.

(Insurance policy marked Libelants' Exhibit 1 for identification.) [17]

Mr. Long: Mr. Henke, I wish you would examine Libelants' Exhibit 1. I think we can stipulate that it may be admitted in evidence as the policy.

The Court: There was an admission made—as to paragraph 1.

Mr. Long: Yes. The allegations of paragraph 1 are admitted without proof.

Mr. Henke: Yes, sir. We will stipulate that this is the policy of the respondent company which was duly issued.

Mr. Long: I will offer it in evidence, your Honor, with the stipulation.

Mr. Henke: No objection.

The Court: It will be admitted as Libelants' Exhibit Number 1.

(Libelants' Exhibit 1 received in evidence.)

Mr. Long: I will call Mr. Jones. [18]

## WINSTON J. JONES

called as a witness by and on behalf of libelants, having been first duly sworn, was examined and testified as follows:

## Direct Examination

By Mr. Long:

Q. Would you state your full name to the Court, Mr. Jones?      A. Winston J. Jones.

Q. Where do you reside, sir?

A. Seattle, Washington.

Q. You have for how long, approximately?

A. Forty-five years.

Q. What is your present business, Mr. Jones?

A. I am District Manager of the State Steamship Company.

Q. Prior to the war, were you engaged in any steamship activity?

A. I was manager of the Alaska Transportation Company.

Q. During the past World War II, in which if any branch of the Armed Services of this country did you serve?

A. I was called on duty in October, 1941, and served in the Port Directors Office, Seattle.

Q. That is the United States Navy?

A. Correct.

Q. Prior to your being called to duty, I assume you were [19] a Reserve Officer in the Navy?

A. That is correct.

(Testimony of Winston J. Jones.)

Q. What was your rank, Mr. Jones, when you entered the active Naval Service during this last war?

A. I was a Lieutenant.

Q. Lieutenant Junior or Senior grade?

A. Senior grade.

Q. And you entered the Service in 1941?

A. October of 1941.

Q. What were your duties as an officer of the United States Navy during the spring of 1942 and particularly during the month of May, 1942?

A. I was Executive Officer to Captain Charles Karrick, the Chief of Staff for Operations and Port Director of the 13th Naval District.

Q. What were your duties in that capacity, Mr Jones?

A. They were multitudinous; they included supervising the operations of all auxiliaries and those auxiliary transportation services and auxiliaries assigned to the 13th District, the Naval Transport and certain other transportation from Chicago.

Q. What area did the 13th Naval District include in May, 1942?

A. In May, 1942, it included the entire Territory of Alaska. [20]

Q. Also the State of Washington?

A. Washington, Oregon, and down as far as below Coos Bay, Oregon, is the line of demarcation.

Q. Do I understand it included all of the Territory of Alaska?

A. That is correct, at that time.

(Testimony of Winston J. Jones.)

Q. Were you in May, 1942, acquainted with the vessel known as the USS Roustabout?

A. Yes, I was.

Q. What if any duties did you have in connection with the operation of the Roustabout in May, 1942?

A. Under my direction all orders were given the ship concerning her loading and her orders for completion of discharge and delivery of supplies to the bases.

Q. By whom was the USS Roustabout owned and operated in May, 1942?

A. She was a commissioned vessel in the United States Navy.

Q. By a commissioned vessel what do you mean?

A. She has the same status as any ship in the Navy.

Q. The same status, for example, as a battleship or a carrier, either?

A. That is correct; combat ship or auxiliary.

Q. Do you remember approximately when the USS Roustabout was acquired and commissioned by the Navy? [21]

A. I don't recall the exact time. I recall that she was operating in the Alaska trade—that is, operating between Seattle and Alaska at the time I was called on duty.

Q. And as a commissioned vessel at that time of the Navy?      A. That is correct.

Q. Would you just briefly describe the Roustabout,—what type of vessel she was?

(Testimony of Winston J. Jones.)

A. She was termed a navy oiler. In the commercial trade that is a tanker. She had a capacity of roughly 10,000 measurement barrels, with dry cargo space as is customary in most tankers.

Q. In May, 1942, how was the Roustabout manned and with whom?

A. She was manned by commissioned officers and enlisted men of the Navy.

Q. Were there any civilian employees on her as either officers or crew? A. No.

Q. Are you acquainted with the name of her Master or Commanding Officers in May, 1942?

A. Yes. It was Larry Parks.

Q. In May, 1942, Mr. Jones, was the USS Roustabout armed in any way? [22]

A. She had armament aboard.

Q. In general, what type of armament was it?

A. I don't recall. She had a stern gun and the usual guns forward but I don't recall the armament that she had.

Q. During about that period had you ever been aboard her personally? A. Yes.

Q. As part of your duty? A. Yes.

Q. Mr. Jones, would you describe to the Court what the duties of the USS Roustabout were in May, 1942, or before or after or along in that period?

A. Well, the Roustabout was used as a shuttle ship between Seattle and the main naval base,—in southeastern Alaska, which was at Sitka. In addition she served the Coast Guard Base at Ketchikan.

(Testimony of Winston J. Jones.)

She served the outlying naval auxiliary base at Port Arthorp and Tamgas Harbor on Annette Island. And on occasion she had occasion to call at a small base we had at Petersburg.

Q. Did she at that time carry any commercial cargo?      A. No.

Q. Was she operated as a merchant vessel at that time, in May, 1942? [23]      A. No.

Q. In May, 1942, Mr. Jones, I will ask you whether or not there were any naval war bases in the City of Seattle?

A. The naval base at Seattle served the entire Alaska-Aleutian area.

Q. I gather it was a base of supply here in Seattle?      A. That is correct.

Q. Where did the USS Roustabout lift her cargo—which I understand was through the orders of your office—at Seattle?

A. Well, we had tanks at the naval base which is commonly known in Seattle as Pier 91. In addition we had a large oil storage area in Manchester. She would pick up part of her cargo at the naval base and the balance at Manchester, or she might pick it all up at Manchester or all up at the naval base, other than the dry cargo which we put aboard at the naval base.

Q. In reference to the dry cargo, what was the character of the dry cargo that the Roustabout carried during May, 1942?

A. Oh, she would carry bombs, ammunition, and



(Testimony of Winston J. Jones.)

drums of petroleum products, torpedoes,—any munitions of war.

Q. Was all of that cargo owned by the United States Navy, [24] property of the Navy?

A. Yes, it was.

Q. To what points in Alaska did she carry that cargo?

A. To the Section Bases,—or to the Air Facilities that I mentioned a moment ago; to Tamgas Harbor on Annette Island, Ketchikan, which is the Coast Guard Base; Sitka, which was our largest base in that area, and the outlying bases of Port Althorp, Port Alexander.

Q. What can you say, Mr. Jones, as to the activity of those war bases in Alaska during May, 1942?

A. Well, the naval auxiliary air services were used as a base for patrols primarily. The exact details of the operations I am not too conversant with.

Q. My question went to this: Were they active war bases during that period?

A. They were.

Mr. Henke: Counsel got his question in a little faster than I anticipated. Your Honor, I move to strike that question and answer as leading and calling for a conclusion of the witness as to the nature of the operation. I have no objection to his describing the operation if he knows but I don't think he should arbitrarily be permitted to describe the war bases.

(Testimony of Winston J. Jones.)

The Court: I will strike the answer. [25]

Mr. Long: I will restate the question.

Q. (By Mr. Long): Do you know, in the course of your duties in the Navy in May, 1942, as you have described, whether or not the bases at Sitka and other ports which were served by the Roustabout were or were not active war bases in May, 1942?

Mr. Henke: I object to the question. I think it calls for a conclusion. I think he should state whether he knows what the activities were.

The Court: The objection is overruled. He can answer the question yes or no.

Mr. Long: I am asking him whether or not he knows there was war activity at those bases.

A. Not from contact but from knowledge of their operations.

Mr. Long: I think I can cover that by another witness, Your Honor.

Q. (By Mr. Long): Mr. Jones, in the course of your duties in your official capacity with the Navy, did you learn as to the activity of those bases?

A. Not in detail.

Q. You mentioned, Mr. Jones, that in May of '42, the time here material, the Roustabout was in a shuttle [26] service between Seattle naval bases and naval bases in Alaska?

Mr. Henke: I object to that testimony because I don't recall the testimony of this witness that she was engaged in shuttle service.

(Testimony of Winston J. Jones.)

The Court: There is something in the testimony—at least embodied in the question of counsel, as to which there was no objection.

Mr. Long: I think Your Honor I asked the witness what service she was in and the witness said she was in shuttle service between war bases in Alaska and the Territory, is that correct?

The Witness: That is correct.

Mr. Long: I didn't suggest it. I asked the question and the witness answered it.

The Court: The objection is overruled.

Q. (By Mr. Long): Will you describe what you mean by shuttle service a little more in detail, Mr. Jones?

A. Well, it was common during the war period to utilize vessels to their best advantage. A ship might be ordered to the Alaska sector on one voyage, return and be ordered to the Hawaiian sector on another. But the Roustabout maintained its regular run between Seattle and southeastern Alaska.

Q. Did she have duties as a naval vessel both northbound and southbound in that service; did she have duties to perform, both northbound and southbound in that shuttle service?

A. Well, northbound she would obviously carry her petroleum products; southbound she would bring returned cargoes of all descriptions.

Q. Could you name a few types of returned cargoes?

(Testimony of Winston J. Jones.)

A. Oh; defective ammunition and empty drums, empty torpedo cases.

Q. I can't ask a leading question. It may sound a little ridiculous, Mr. Jones, but what was her purpose of returning to Seattle in this service?

A. In order to reload.

Q. For what purpose?

A. For the same bases.

Q. By whom, Mr. Jones, was her cargo used in Alaska; that is to say, the cargo which she carried to Alaska, who used?

A. The Naval Forces Afloat, Ashore, and in the Air.

Q. Who used or made use of the cargo she carried southbound?

A. They were confined to the Navy,—various naval activities. If it were defective ammunition, it would be delivered to Ordnance. If it were airplane [28] parts, they would be delivered to Naval Air, and of course, the empty—

Q. What about the empty gasoline or oil drums she carried outbound, what were they used for?

A. They would be returned for refilling.

Q. What use would be made of them after they were refilled?

A. They would be returned to the north, presumably; whether the exact drum would be returned or not, I don't know.

Q. At the time of the collision on May 11th, 1942, I will ask you whether or not the USS Roust-

(Testimony of Winston J. Jones.)

about was on active naval duty under your officers' jurisdiction?

Mr. Henke: I think that calls for a conclusion. He can tell what the vessel was doing. He has already done that.

Mr. Long: I think I am entitled to ask of this witness if she was on active naval duty.

The Court: The objection is overruled.

Mr. Long: Will you answer the question.

A. Yes, she was on active naval duty.

Q. (By Mr. Long): Was she duly commissioned as a naval vessel at that time?

A. Yes, she was.

Mr. Long: I think you may examine, Mr. Henke.

#### Cross Examination

By Mr. Henke:

Q. Mr. Jones, when we use the term that the vessel is a commissioned vessel in the Navy, we mean merely that she has been taken as a part of the naval establishment and is manned by a naval crew, is that not correct?

A. A commissioned vessel of the United States Navy is a ship of the Navy, regardless of what her past history was or what her category was.

Q. Yes. But my question is that when we use the term "a commissioned vessel of the United States Navy," we actually mean that she is manned by a naval crew and a specific part of the naval establishment?

A. And has been brought up to Navy standards.

Q. The vessel wouldn't necessarily have to be

(Testimony of Winston J. Jones.)

brought up to Navy standards to be commissioned?

A. That is correct.

Q. Thus we say that a naval vessel is commissioned when we remove the Navy crew from her and put her in storage; she still belongs to the Navy, is that right?

A. That is correct.

Q. So that actually the term "commission" means primarily that she is manned by a Navy crew. And correspondingly, [30] a tug which operates here out in the harbor, which is a part of the Navy establishment and is manned by a Navy crew, is a commissioned vessel of the Navy?

A. Not necessarily. A tug might be just called in service. There are different categories on that.

Q. How about aircraft rescue vessels?

A. An aircraft rescue vessel? You will have to describe the type.

Q. Yes; I will be glad to describe several types. There is the type which has in effect a powered scow with a derrick on board for aircraft rescue.

A. Do you mean what we term a "Mary Ann"?

Q. I think that possibly is correct.

A. That would not be a Navy vessel.

Q. How about a net tender?

A. The larger net tenders would be commissioned vessels.

Q. How about what is known as a "Mickey Mickey Tug"—one of the larger type tugs?

A. That is an Army type of tug, not Navy.

Q. Well, the Navy has the same type, don't they?

A. Not exactly, no; I wish they had.



(Testimony of Winston J. Jones.)

Q. Considering a Navy tug comparable to that, that would be a Navy vessel, would it not?

A. That is correct. [31]

Q. So that when we consider the question of whether or not a vessel is commissioned, we mean merely that it is part of the naval establishment and has a Navy crew aboard? A. Yes, sir.

Q. Now, referring to the Roustabout and her cargo facilities, as I understand that she did have one hold which was designed for the carriage of dry cargo as is common in tankers of that type?

A. That is correct.

Q. She was primarily, however, designed for the purpose of carrying petroleum products in bulk?

A. That is correct.

Q. And her voyages north, the dry cargo which was aboard consisted to a very large extent of Ships Service Stores, did it not? A. No.

Q. Ships Service Stores were a substantial part of her dry cargo, were they not? A. No.

Q. Have you consulted the records?

A. I recall at that time that we were in dire need of transportation and we used the dry cargo space of the Roustabout for bombs and other munitions which were direly needed in the north. Obviously, if I [32] may say—obviously, there were Ships Stores aboard but not in the proportion which you indicate.

Q. Upon her return from these northern ports, she would return in ballast, would she not; that is, she would carry sufficient water to make her navi-

(Testimony of Winston J. Jones.)

gate properly?      A. Yes, sir.

Q. And the only other cargo which she would have aboard would be the empty oil drums and miscellaneous things of that type which she might casually pick up at the various points at which she stopped?

A. Anything that they desired to send down that she could carry.

Q. Anything that was handy, they would put aboard her to make use of the return voyage?

A. That is correct.

Q. But primarily she was coming back in ballast, so to speak?      A. That is correct.

Q. Actually, her principal port of call in Alaska was Sitka, was it not?      A. Yes.

Q. And she would—as any other tanker would—pump her tanks dry into tanks on shore and then she would return to Seattle?

A. At times she was used by the Commander of the Sector [33] to serve outlying points in the south-eastern Alaska area, the points being the facilities I mentioned a little while ago.

Q. The Coast Guard base at Ketchikan and points of that nature?      A. That is correct.

Mr. Henke: I think that is all. Thank you.

#### Redirect Examination

By Mr. Long:

Q. I think you said, Mr. Jones, that the dry cargo hold was employed at that time for bombs and ammunition because they were direly needed?

A. That is correct.

(Testimony of Winston J. Jones.)

Q. Would you amplify that statement a little bit, please; badly needed where and why?

A. Badly needed by the Alaska and Sitka Sector.

Q. What were these ammunition and bombs needed for?

A. A great any aerial bombs were sent north for the patrol planes,—torpedoes and various and sundry other munitions.

Q. Counsel's examination of you, Mr. Jones, with reference to the cargo she picked up southbound, indicated she would just pick it up when it was handy; what was the fact about that? Was she dispatched south with [34] definite cargo?

A. She was dispatched southbound with all they could get aboard.

Mr. Long: I think that is all.

### Recross Examination

By Mr. Henke:

Q. When you say she was dispatched southbound with all they could get aboard,—how much dry cargo was she capable of carrying; what was her cubic area for dry cargo?

A. As I recall, it was approximately 250 tons.

Q. That is a relatively small capacity, is it not?

A. It is not a great amount.

Q. As she was a carrier of petroleum, the logical thing for her to carry upon her return to the United States would be empty oil drums, would it not?

A. Not entirely. At that time space was so much

(Testimony of Winston J. Jones.)

at a premium, as I mentioned a short time ago, she was extremely valuable to us.

Q. Was space at a premium southbound from Alaska?

A. Space was at a premium all bounds.

Q. That interests me, Mr. Jones. What products were they shipping south from Alaska at that time; I thought the movement was the other direction. [35]

A. That is correct. For some unknown reason there is a tremendous amount of defective ammunition always moving the other way from an advance area.

#### Further Redirect Examination

By Mr. Long:

Q. Defective ammunition, you say?

A. Yes. The point that you are bringing out is that there were many ships going north and that they were coming back in ballast. The point is that she was making these points that were not served by regular service.

Q. That is a situation peculiar to herself, that she was serving these various stations there and it was convenient for you to use her on returns?

A. That is correct.

Mr. Long: I think that is all, Mr. Jones, unless your Honor has any questions.

I didn't ask one other question which I think I should in justice to you, Mr. Jones.

Q. (By Mr. Long): What rank were you in the Navy at the time of your discharge?

(Testimony of Winston J. Jones.)

A. Commander.

Mr. Long: May the witness be excused?

(Witness excused.) [36]

(Short recess.)

The Court: Are we ready to proceed, gentlemen?

Mr. Long: I should like to call as the next witness, your Honor, Captain Lawrence A. Parks.

LAWRENCE A. PARKS,

called as a witness by and on behalf of the libelants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Long:

Q. You were subpoenaed to be here, Captain Parks, today? A. That is right, sir.

Q. Would you state your full name?

A. Lawrence A. Parks.

Q. Where do you reside?

A. Seattle, Washington.

Q. What is your present occupation, Captain Parks? A. I am a Ships Master.

Q. What vessel? A. Grommet Reefer.

Q. For what company?

A. Alaska Transportation Company [37]

Q. What if any licenses do you hold issued by or through the United States Department of Commerce or the Coast Guard?

(Testimony of Lawrence A. Parks.)

A. Master of Steamer Vessels of any gross tonnage, any ocean.

Q. That is commonly referred to as a Master's License Unlimited.      A. That is right, sir.

Q. What other licenses do you hold?

A. Pilot's License for Southeastern and Southwestern Alaska.

Q. Approximately how long, Captain, have you held those licenses?

A. The Unlimited License I had in 1941.

Q. That is the Master's Unlimited?

A. Yes, sir.

Q. And your pilot's licenses were issued at about what time, Captain?      A. 1925.

Q. How many years, Captain, have you been going to sea approximately in all capacities?

A. I started in 1914, though there was a break of three or four years in there that I wasn't on the sea.

Q. You came up through the ordinary, usual grades of ordinary seaman and able seaman? [38]

A. Yes, sir.

Q. Third Officer, Second Officer, Master, and the Pilot's License?

A. I skipped Third Officer.

Q. During and prior to the outbreak of World War II, were you in the United States Naval Reserve?      A. Yes, sir.

Q. Were you called to service, active duty?

A. Yes, sir.

Q. About what date, Captain?



(Testimony of Lawrence A. Parks.)

A. I went on active duty on the 12th of May, 1941.

Q. Where was that active duty served when you first were activated?

A. I reported for duty here at the 13th Naval District in Seattle.

Q. You became Master of the Steamer USS Roustabout, did you not? A. Yes, sir.

Q. Were you her Commanding Officer on May 11th, 1942? A. Yes, sir.

Q. Prior to taking over command of the USS Roustabout, what in general was the nature of your naval duty and where?

A. For six months prior to taking command of the Roustabout, I was Commanding Officer of the Section Base at Sitka, [39] Alaska.

Q. What type of base was that, so that we may understand a little better, Captain?

A. Well, a Section Base was established in connection with the Naval Air Station. The Commanding Officer of the Section Base and the men on the Section Base operated the boats, service crafts, patrol boats, had charge of the docks—had charge of all service activities.

Q. At that base or from that base?

A. From that base, yes, sir.

Q. You say there was a naval air station at Sitka? A. Yes, sir.

Q. Was that a large or a small station?

A. It was under construction then to be a large station.

(Testimony of Lawrence A. Parks.)

Q. Approximately when was it completed for use?

A. Well, it was being used from 1941, or from 1940 I believe on until—I believe in 1944, and the station at that time was beginning—it never was completed—it was beginning to go back down hill again. The need for it seemed to be less.

Q. Was that because the activity had moved more to the westward?      A. Yes, sir.

Q. Westward Alaska? [40]      A. Yes.

Q. Captain, what, if anything, did you do while stationed at that Sitka Section Base, toward establishing any other naval bases in that general vicinity of southeastern Alaska?

A. The Commanding Officer at the Naval Air Station at Sitka, I was on his staff for the establishment of the other bases in southeastern Alaska.

Q. What were those other bases?

A. Port Althorp and Port Armstrong.

Q. What was your rank as an officer at that time, Captain?      A. Lieutenant.

Q. Senior grade?

A. Senior grade; yes, sir.

Q. Approximately when did you become Commanding Officer of the USS Roustabout?

A. March 30th, 1942.

Q. And remained as her Commanding Officer until approximately what date?

A. April of '44.

Q. Captain Parks, would you please describe the character of the USS Roustabout, so that the

(Testimony of Lawrence A. Parks.)

Court may understand what her size and dimensions and her characteristics were?

A. She was a small tanker, carrying bulk petroleum products, [41] and also had a dry cargo hold aft with a capacity of in the neighborhood of 250 cubic—

Q. Measurement tons?

A. Measurement tons.

Q. About what was her over-all length, approximately? A. 221 feet, I believe.

Q. What breadth; what was her beam?

A. 39 feet.

Q. At the time you took command of her as her Commanding Officer, what was her status, if any, in the United States Navy?

A. She was a commissioned vessel in the United States Navy.

Q. How was she manned?

A. Navy; an all-Navy crew.

Q. Were the officers naval officers?

A. Yes, sir.

Q. What were her unlicensed personnel?

A. Naval enlisted men.

Q. Were any civilian employees a portion or part of her crew? A. No, sir.

Q. Did that same situation as to her manning by naval officers and crew obtain at the time of this collision we have before us, May 11th, 1942? [42]

A. Yes, sir.

Q. Was she on May 11th, 1942, a commissioned naval vessel? A. Yes, sir.

(Testimony of Lawrence A. Parks.)

Q. During May, 1942, what if any armament did the USS Roustabout have?

A. She had a 3-inch, 50-caliber gun on the stern; two 50-caliber machine guns on the bridge, and two 20-milliammeter guns forward.

Q. Did she have ammunition with which to serve those guns on board in May of '42?

A. Yes, sir.

Q. Did she have a crew who could operate and fire the guns?      A. Yes, sir.

Q. What was the purpose of that armament?

A. For our protection.

Q. Protection against whom? We have to have it in the record. I know and the Court knows, but we have to have it in the record, Captain.

A. Well, the thought was the Japanese subs might get over in our neighborhood, there.

Q. Were any reported in your neighborhood?

A. Yes, sir.

Q. Were any sunk in your neighborhood—Japanese [43] submarines sunk?

A. One, I believe.

Q. Was that armament capable of being used for offensive purposes?      A. Yes, sir.

Q. Against small craft?      A. Yes, sir.

Q. And aircraft?      A. Yes, sir.

Q. During your service on the Roustabout, Captain Parks, in what service for the United States Navy was she engaged; will you describe the nature of her service?

A. Well, the primary duty was carrying bulk

(Testimony of Lawrence A. Parks.)

petroleum products to Southeastern Alaska.

Q. For whom and for whose use?

A. The United States Navy.

Q. Where did you load that type of cargo on the USS Roustabout, say in May of that period, 1942?

A. The Seattle Naval Station.

Q. Where is that located here in the harbor?

A. Pier 91.

Q. What type of cargo, if you recall, was it that you did load; what type of oil?

A. Well, I don't know that particular trip. We carried [44] four different types of oil but we wouldn't always have that four types every trip. We carried heavy steaming oil, black oil, Diesel oil, motor gasoline, and aviation gasoline.

Q. Did you carry any petroleum products in drums—or barrels, as we might call them?

A. Yes.

Q. What type product was carried in that fashion?

A. That was lubricating oil.

Q. Did you load the cargo at any other place other than the naval base at Pier 91 in Seattle, in this service?

A. 90 and 91. We used to get our dry cargo at 90.

Q. What type of dry cargo did you carry north-bound?

A. The cargo we got at 90 would be mostly ships service stores.

Q. What other type of dry cargo did you carry?

A. Bombs and ammunition.

(Testimony of Lawrence A. Parks.)

Q. Where would you load that?

A. Up at Indian Island, Ordnance Depot.

Q. For the Court's information, where is Indian Island?

A. It is up just south of Port Townsend in the harbor, there.

Q. In Puget Sound?

A. In Puget Sound, yes.

Q. Approximately how far from Seattle? [45]

A. Forty miles.

A. What was Indian Island at that time?

A. A Naval Ammunition Depot.

Q. On your northbound trip with the petroleum products and dry cargoes which you have described, where was that dry cargo carried, and the petroleum products carried?

A. Our main port of discharge was Sitka. We also discharged at—if we had a cargo for Ketchikan, then we discharged that northbound for Sitka.

Q. For whose use was the petroleum product and the bombs and ammunition and other things that you carried; who used it?

A. Most of it was the Navy and Coast Guard. Occasionally, we would carry some fuel for the Army.

Q. For what purpose was it used?

A. Well, for the maintenance of the bases and the carrying on of the war effort.

Q. Was it used in combat craft, both surface and air?      A. I can only assume that.

Q. I will ask you: are you familiar with the



(Testimony of Lawrence A. Parks.)

activity of the war bases which your vessels served during May of '42? A. Yes, sir.

Q. I will ask you whether or not there was any war activity [46] at those bases and from those bases? A. Yes, sir.

Q. And did the products which you carried—petroleum and dry cargo, ammunition and so forth—go to those war bases for their use?

A. Yes, sir.

Q. You have mentioned the war base at Sitka. What other war bases did the Roustabout serve?

A. The Coast Guard bases at Ketchikan.

Q. What others? A. Port Armstrong.

Q. Was that an active base? A. Yes.

Q. Any other? A. Port Althorp.

Q. Was that also an active base?

A. Yes, sir.

Q. What kind of activity was being carried on from Sitka, Port Althorp and those other bases you have mentioned?

A. They operated both surface and airplane patrols off the Coast.

Q. What is the function of surface and air patrol and was the function at that time in May '42?

A. To watch for any enemy vessels and convoying our own [47] vessels.

Q. Would you state whether or not during that time there was any reported enemy activity in that general region? A. Yes, sir; there was.

Q. What was the duty of the USS Roustabout on her southbound voyage, after delivering her pe-

(Testimony of Lawrence A. Parks.)

troleum products to the bases you have indicated and her dry cargo to the bases you have indicated; what was her duty on her southbound voyage?

A. Why, we would take any freight offered by the Navy or Coast Guard that we were able to handle and take it to Seattle.

Q. What was the character of that cargo southbound?      A. It was very varied.

Q. Would you just give us an idea, please?

A. Oh, empty containers, oil drums, empty acetylene and oxygen tanks, damaged airplane motors, damaged airplanes, trucks, automobiles.

Q. By whom was that cargo owned that you brought southbound?      A. United States Navy.

Q. Did you carry any commercial cargo for hire either northbound or southbound on the USS Roustabout?      A. No, sir. [48]

Q. Was the vessel employed as a Merchant vessel in May, 1942, either northbound or southbound?

A. No, sir.

Q. You have mentioned some of the southbound cargo. I will ask you whether or not you carried southbound from time to time defective ammunition,—torpedo cases?      A. Torpedo cases.

Q. I beg your pardon?      A. Yes, sir.

Q. Your vessel being principally a tank vessel, Captain, was there any petroleum products to be returned from Alaska to Seattle?      A. No, sir.

Q. So you came down, of course, light except for the various materials that you have mentioned of the Navy?

(Testimony of Lawrence A. Parks.)

A. We had ballast in our tanks to give us the draft we desired.

Q. So that your vessel would be in proper trim and proper maneuverability?

A. That is right.

Q. What was your purpose in returning to Seattle? A. To load up and go north again.

Q. Was that your purpose in returning to Seattle on May [49] 11, 1942, at the time of the collision? A. Yes, sir.

Q. When you speak of "load up," you mean load up with what?

A. With a full load of bulk oil,—all we could carry—and whatever else the Navy decided to ship with us that we could handle in the way of dry cargo.

Q. Is it correct to say, Captain Parks, that your vessel was engaged in May, 1942, in what might be described as a shuttle service between the war bases here and the war bases in Alaska that you have described? A. Yes, sir.

Q. Did the Roustabout go any place else other than Alaska waters or through British Columbia waters? A. No; that is all.

Q. Was your vessel ever called upon to do any convoy duty to protect a merchant vessel from possible enemy attack? A. No, sir.

Q. Do you recall of one occasion of when it was?

A. No, sir.

Mr. Henke: I object to Counsel cross-examining his own witness.

(Testimony of Lawrence A. Parks.)

Mr. Long: I want to refresh his recollection. He told me about it yesterday. [50]

Q. (By Mr. Long): Do you recall the fishing vessel *La Mercede*?      A. No, sir.

Mr. Long: Possibly that was after you had left here. If so, I stand corrected.

Q. (By Mr. Long): Captain Parks, approximately what time on May 11th, 1942, did the collision take place between your vessel and the *Eastern Prince*, if you recall?

A. I don't recall the exact time. It was some time after midnight, I believe.

Q. In what body of water did that collision take place?

A. Discovery Passage, British Columbia.

Q. British Columbia waters?      A. Yes, sir.

Q. Approximately how many times would you say you had navigated that body of water prior to this collision, either north or southbound?

A. Oh, a thousand times.

Q. Are you acquainted with Discovery Passage from its northernmost and southernmost end?

A. Yes, sir.

Q. In general, how does it lie as to north and south or east and west?

A. It runs in a northerly and southerly direction. [51]

Q. At the time and prior to the collision with the *Eastern Prince* on May 11, 1942, was your vessel northbound or southbound?

A. Southbound.

(Testimony of Lawrence A. Parks.)

Q. What was the state of the weather as to visibility at that time?

A. The visibility was good.

Q. What rules governed the navigation of vessels in Discovery Passage at the time of this collision, the International Rules or the Inland Rules?

A. The International Rules.

Q. Are you, Captain Parks, familiar with International Rule 25 having to do with Narrow Channels?

A. Yes, sir.

Q. I will ask you whether or not you regard Discovery Passage and that portion at the site of the collision between the two vessels as a narrow passage within the meaning of International Rule 25?

A. Yes, under those rules I guess it would be considered a narrow channel.

Q. You say it would be considered a narrow channel under Article 25 of the International Rules?

A. Yes, sir.

Mr. Long: I might say that 33 USCA Section 110 is the Article 25 of the International Rules. [52]

Q. (By Mr. Long): I will ask you, Captain Parks, at the time of and immediately prior to the collision was your vessel to the easterly side of mid-channel of Discovery Passage,—in other words, to your port?

A. Yes, sir.

Q. And by port you mean to your left side?

A. That is right.

Q. Of mid-channel, of course,—to the left side

(Testimony of Lawrence A. Parks.)

of mid-channel, looking over your bow, is that correct?      A. That is right.

Q. Prior to the collision did you observe the lights of the Eastern Prince?      A. Yes, sir.

Q. After observing the lights of the Eastern Prince and prior to the collision, was the course of the USS Roustabout altered?      A. Yes, sir.

Q. Were any signals sounded in accordance with United States International Rule 28 upon the changing of that course?      A. No, sir.

Q. I mean sounded by the Roustabout?

A. No, sir.

Q. At the time of the collision with the Eastern Prince, [53] was the Roustabout on active naval duty?      A. Yes, sir.

Q. Was she at that time a duly commissioned naval vessel?      A. Yes, sir.

Q. On May 11th, 1942, at the time of the collision, was the Roustabout carrying any commercial cargo for hire?      A. No, sir.

Q. Was she at that time engaged as a merchant vessel in any respect?      A. No, sir.

Mr. Long: I think you may examine, Mr. Henke. I have one other question.

Q. (By Mr. Long): Captain Parks, you have stated that at the time of and prior to the collision your vessel, proceeding southerly, was on the port or left-hand side of mid-channel. I will ask you whether or not it was safe and practical to be on the right-hand side or starboard side of mid-channel, had you so desired?



(Testimony of Lawrence A. Parks.)

A. It was not practical as the starboard side of the channel is shoal.

Q. Was it safe; did you have enough water? [54]

A. Providing I didn't get too far over; yes, sir.

Q. Isn't there, as a matter of fact, ample water and ample space on the starboard side of the mid-line of that channel to avoid a collision?

A. Yes; there is.

Q. In other words, you could have with safety to your vessel stayed on your right side of the channel,—of the midline of the channel?

A. Yes, sir.

Mr. Long: That is all.

#### Cross Examination

By Mr. Henke:

Q. Captain Parks, at the time the accident occurred involving the Roustabout and the Eastern Prince, there were no restrictions on any navigation aids in the Alaskan area,—southeastern Alaska area where you were navigating, were there; that is, all lights were showing that normally would show in peacetime? A. Yes.

Q. All of the vessels which were operating in that territory showed their usual running and navigating lights in the customary manner as in peacetimes, did they not? A. Yes, sir. [55]

Q. Prior to your entry into the Navy, you had been a Ship's Master for the Alaska Transportation Company, had you not? A. Yes, sir.

Q. And as such you operated various other vessels through these same waters at other times?

(Testimony of Lawrence A. Parks.)

A. Yes, sir.

Q. How long previous to this accident had you been navigating in these same waters?

A. Off and on for twenty-eight years.

Q. So far as conditions for navigating were concerned, at the time of this accident they were substantially the same as existed prior to the war and substantially the same as exist now?

A. That is right.

Q. None of the ships were blacked out or following a zig-zag course or anything of that nature, were they?      A. No, sir.

Q. During the time, Captain, that you were Commanding Officer of the Roustabout, did you see any naval vessels or naval planes of any kind?

A. No, sir.

Q. Was the Roustabout the subject of any attack by enemy naval forces of any kind?

A. Never. [56]

Q. So far as your actual experience in the operation of that vessel, it was substantially the same as your experience before the war and your experience now except that you had a Navy crew on board the vessel that you were in command of?

A. Yes. It was a good deal the same.

Q. Referring to the cargo which you carried, as I understand you operated from Seattle primarily to the naval establishment at Sitka?

A. Yes, sir.

Q. And in the course of that operation you would pick up petroleum and miscellaneous dry stores to the limit of your capacity in Seattle and

(Testimony of Lawrence A. Parks.)

would take them up to Sitka and Ketchikan and those points that they desired them to be delivered at?      A. That is **right**.

Q. As I understand from your statement, a substantial portion of the dry cargo that you carried northbound was ships stores?

A. Ships Service Stores is the word I used.

Q. Ships Service Stores; I misspoke myself. Would you just state the nature of Ships Service Stores for the record?

A. Well, Ships Service Stores would be anything that they would sell in the Ships Service store at these various [57] bases. That covers practically every article that you would find in any store, almost.

Q. What is a Ship's Service Store?

A. It is a store operated by the Navy for their own service men.

Q. For their own personnel?      A. Yes, sir.

Q. That is, you could buy in a Ship's Service Store Coca Cola or a fountain pen or anything that you wanted of personal supplies?

A. That is right, sir.

Q. They correspond in the same manner as a Post Exchange in the Army?

A. That is right.

Q. Referring to the accident, itself, you were at that time returning from Sitka; where were you returning from at that time—where had you started from?

(Testimony of Lawrence A. Parks.)

A. I had been at Sitka and I imagine my last port of call had been Ketchikan.

Q. You were, then, returning to Seattle?

A. That is right.

Q. And the vessel at that time had only aboard water ballast to make navigation of it convenient and some miscellaneous dry cargo which you had picked up at these various ports? [58]

A. That is right.

Q. Dry cargo which probably was primarily oil drums and containers of that type and miscellaneous things that they wanted returned to Seattle?

A. That is right.

Q. Counsel was referring to this channel where the accident occurred. What is the condition of that channel to the westward—I mean as to the depth of water and the navigating conditions there?

A. The west side of the channel by the Campbell River—the river comes down and it is a flat out there, so all ships stay to the east side of the channel there.

Q. From your years of experience in navigating those waters, you had determined that it was relatively unsafe to get too close to the west side of that channel?      A. That is correct.

Q. Prior to the collision with the Eastern Prince, did you see any lights of other vessels?

A. Yes, sir.

Q. What were the navigating conditions at that time; was the view obstructed or did you have a

(Testimony of Lawrence A. Parks.)

relatively clear opportunity to observe other vessels?      A. A very clear night. [59]

Q. As you were proceeding south, you state that you observed the lights of other vessels; can you state the nature of the lights which you observed?

A. Two of these vessels were south vessels, northbound in the same channel, over on our starboard side. They were showing the customary navigation lights, in other words, they were showing a white light and a green light forward that I could see. Another one was southbound which I overtook and passed and it had a stern light, headlight, and the port light was visible to us. And then the Eastern Prince, as I found out later, had—all of the lights that I could see on it were three white lights.

Q. These vessels that you referred to, which were northbound, what was their character; I mean, what type of vessels were they?

A. They were, I imagine, small fishing boats. I couldn't tell just what they were, but they were very small.

Q. As a vessel approaches you under those circumstances, what lights should you see, Captain; that is, assuming a vessel going in the opposite direction from you, what lights should show?

A. That would depend upon which side they were on over my bow.

Q. Will you explain your answer? [60]

A. If they were on my right, I should see a

(Testimony of Lawrence A. Parks.)

white light and a green. If they were on my left, I should see a white light and a red.

Q. Where would the white light be?

A. I will qualify that, too. On large vessels you would see two white lights—a mast headlight and range light. On the smaller ones, it isn't necessary to carry the range light.

Q. You say you would see a white light and a red light or a white light and a green light; what would that indicate to you?

A. That would indicate to me the heading of that vessel; what side it was going to pass on.

Q. The red light would be its port light and the green light its starboard?

A. That is right.

Q. The white light which you referred to and the range light, what do those indicate to you?

A. Well, if they carry a range light, they are in line—one slightly aft and one slightly above the other; in other words, they will give you the heading of the other ship.

Q. When you see those two lights in that manner, you are then conscious of the fact that the vessel approaching is a fairly substantial vessel and the [61] range lights give you an opportunity to determine the exact direction of its course?

A. That is right.

Q. In the smaller vessels that you refer to, they normally carry only one small white light?

A. Most of them just carry a headlight.



(Testimony of Lawrence A. Parks.)

Q. Of course, in a case of a tug carrying a tow, it would have a different type of light, would it not? A. That is right.

Q. Which would signify to you the nature of the tow that you had? A. That is right.

Q. As he approached the *Eastern Prince*, did you see any navigating lights—that is, the red or green lights of the vessel? A. No, sir.

Q. What lights did you see?

A. I saw one white light up quite high, which I took to be a range light—as the range light is carried by smaller vessels, the range light shows around 360 degrees—and two lights seemingly close together down below.

Q. But you saw no navigating lights of any kind? A. Neither red nor green, no.

Q. Then as you continued to approach the *Eastern Prince*, [62] what opinion did you form as to the direction in which she was going?

A. I thought she was going in the same direction we were.

Q. In other words, you assumed that you were actually overtaking the *Eastern Prince*?

A. That is right.

Q. Counsel has referred to the change that you made in your course. Can you explain the nature of that change?

A. As we got closer to the other vessel, which later developed to be the *Eastern Prince*, the angle of the other vessel—the angle of the bow was closer: we were getting closer to it. So I hauled the *Roust-*

(Testimony of Lawrence A. Parks.)

about a little further to the left, still thinking we were overtaking it and passing too close to it.

Q. So that you turned your vessel in towards the left or portside with the thought of allowing additional space as you passed the vessel that you thought you were overtaking?

A. That is correct.

Q. During this entire period were you continuing to observe the Eastern Prince?

A. Yes, sir.

Q. When did you first become conscious of the fact that [63] you were not overtaking the Eastern Prince in the sense that the vessel was going the same direction that you were, and that you were overtaking it from the rear?

A. We were getting very close together and I believe the Eastern Prince hauled hard right. When they did so, I saw their red light then and I hauled the Roustabout hard left and went full astern.

Q. What contact was made between the vessel?

The Court: Before we get into that subject, perhaps this would be a good time to take our recess.

We will be in recess now until 2:00 o'clock this afternoon.

(At 12:00 noon, July 16th, 1947, proceedings recessed until 2:00 p.m., on the same day, in the United States Court House.) [64]

Seattle, Washington

July 16th, 1947, 2:00 p.m.

(All parties present as before.)

The Court: Are we ready, gentlemen?

Mr. Henke: Yes, your Honor.

Mr. Long: Yes, your Honor.

LAWRENCE A. PARKS

(Resumed)

Cross-Examination—(Continuing)

(Last question repeated by the reporter.)

Mr. Henke: Strike that question, will you, and we will start over again.

By Mr. Henke:

Q. Captain Parks, when we adjourned this noon, I believe you had stated that as you approached the Eastern Prince you were under the impression that the Eastern Prince was a vessel proceeding in the same direction as your own vessel, is that correct? [65] A. That is correct.

Q. When did you first become conscious of the fact that the Eastern Prince was not going in the same direction as the Roustabout but was actually proceeding in the opposite direction?

A. I don't remember exactly but it couldn't have been over a couple of minutes before the collision—a very short time before the collision.

Q. What occurred which brought to your attention the fact that the Eastern Prince was not going in the same direction as you were?

A. I saw their portside light.

Mr. Long: That is the red one?

The Witness: The red one, yes.

(Testimony of Lawrence A. Parks.)

Q. (By Mr. Henke): How did that appear—suddenly or in what manner?

A. I think they must have turned the Eastern Prince to the right some, which exposed the light.

Q. What did you do when you saw the light?

A. Put the engines full speed astern and our ship's rudder hard left.

Q. When that occurred, were both ships turning in the same direction—that is, towards the shore?

A. Opposite directions.

Q. Opposite directions? [66]

A. Both turning towards the shore, one turning left and one turning right.

Q. Your engines were fully reversed at that time?

A. Yes, sir.

Q. Approximately how far from the Eastern Prince were you at that time—that is, when you first became conscious of the existence of the port light of the Eastern Prince?

A. I don't recall. I could make a guess now but it has been five years ago and I don't recall just—

Q. We understand it would be an approximation, naturally, under the circumstances.

A. I would say within two hundred or three hundred feet.

Q. What portions of the vessels came in contact?

A. The bow of the Roustabout and the stern of the port quarter of the Eastern Prince.

(Testimony of Lawrence A. Parks.)

Q. What speed was the Roustabout going at the time of the contact? A. Practically stopped.

Q. What occurred when the two vessels made contact?

A. Oh, a very, very slight impact—sliding; they were still going under way ahead and we were practically stopped and just scraped along their stern.

Q. Did the Roustabout catch on any part of the Eastern Prince? [67] A. The boat davit.

Q. The boat davit, you say?

A. The boat davit, yes.

Q. Actually, do you think there would have been any contact between the vessels if the boat davit hadn't been located in that particular location?

A. It would have been very close.

Q. What damage was done to the Roustabout?

A. None.

Q. I take it from what you say that the prow of the Roustabout caught on this boat davit and the pressure of the Roustabout going by did damage the Eastern Prince.

A. I think it may have hit the port of the Eastern Prince anyway, but I don't think it would have done as much damage if it hadn't of hit that davit.

Q. The davit tended to pull part of the Eastern Prince with it? A. I believe so.

Q. What was the situation of the Eastern Prince, when you observed her at that time, as to

(Testimony of Lawrence A. Parks.)

her decks; did they have a substantial deckload on the Eastern Prince?      A. Yes, they did.

Q. What was the nature of the deckload around the location of the navigating lights of the Eastern Prince— [68] the running lights?

A. I believe it concealed them from shining ahead.

Q. What was the nature of that deckload, can you recall?

A. It was construction material, lumber, I believe.

Q. And that was piled up high on the deck?

A. That is right.

Q. And by reason of that material being there, it was impossible for an oncoming vessel to see her port and starboard lights?      A. That is right.

Mr. Long: I don't think the witness said that, your Honor. He said he believed it concealed the lights.

The Court: That is assuming a fact not yet in evidence.

Mr. Long: I object therefore to the form of the question.

The Court: Objection sustained.

Q. (By Mr. Henke): Can you state what the effect was, Mr. Parks, of the existence of this deckload on the port or starboard lights so far as visibility for any oncoming vessel was concerned?

A. I believe it would obscure them.



(Testimony of Lawrence A. Parks.)

Q. So that an oncoming vessel would only see the white [69] lights on the Eastern Prince?

A. Yes, sir.

Q. What was the situation as to these white lights that you saw? Were there any lights upon the Eastern Prince that were other than the regular navigating and running lights for such a vessel?

A. Yes, sir; they had the deck lights on aft around the cabin.

Q. Those lights were visible to you as you approached?

A. They were visible to me after they had changed course and not before.

Q. That is referring to the white lights that were on deck?

A. When I first saw the Eastern Prince, I could only see the one white light; later I could see the other two.

Q. Did you see one white light before you saw the red port light? A. Yes.

Q. There are a large number of fishing vessels that operate in these particular waters, are there not? A. Yes, sir.

Q. It is quite common, is it not, for you to see the one white light on such a vessel together with the lights from her cabin as you approach from the rear—is that not correct—in these waters? [70]

A. Yes.

Q. You had seen I suppose literally thousands

(Testimony of Lawrence A. Parks.)

of such lights and vessels in the course of your navigating in these waters?

A. A large number of them.

Mr. Henke: I believe that is all.

Redirect Examination

By Mr. Long:

Q. Captain, just a few questions. Discovery Passage is a portion or a segment of the usual inside route to Alaska, is it not?      A. Yes, sir.

Q. And as such it is a rather heavily traveled channel by vessels going to and from Alaska and British Columbia?      A. That is right.

Q. Isn't it true that that was particularly so during this period that we are discussing in as much as vessels were not traveling outside but rather all using the inside passage?

A. I believe that is correct.

Q. Why was it, Captain, that vessels were not using the outside passage during that period?

A. Are you speaking of American vessels only?

Q. American vessels, yes.

A. The routing officer, United States Navy, routed them all inside.

Q. Why?

A. Presumably because of the danger of enemy submarines outside.

Q. You say that you saw the Eastern Prince's port or red light approximately two minutes before the collision?      A. That is just a rough guess.

Q. It is an approximation?

(Testimony of Lawrence A. Parks.)

A. Yes; it is an approximation.

Q. I understand that. That is why I use the word "approximately." A. Yes, sir.

Q. What speed was your vessel making over the ground when you saw the Eastern Prince's red light; that would be a combination of your water speed and current, wouldn't it?

A. That is right. I probably stated that in the log book or in my other deposition—I don't remember now. I know I figured it up at one time.

Q. I recollect that was about twelve knots over the ground; would that be approximately correct?

A. That would be approximately our speed.

Q. You stated that in your deposition in the other case of Link against the United States.

A. I knew I had stated it but I didn't know what the figure was.

Q. You would be making, then, approximately twelve knots over the ground or we will say approximately eight knots through the water. On a full astern bell at that speed, how soon could you bring your vessel to a dead stop in the water—from the time you reached for the telegraph, put your engines full astern and the engineer puts the throttles full astern and reverses the engines, do you stop?

A. We didn't have to contend with that up there. It was a Diesel-electric and you are full astern from the bridge.

(Testimony of Lawrence A. Parks.)

Q. What length of time would that take; what is your best judgment?

A. Three and one-half to four minutes.

Q. And you hadn't quite stopped dead in the water at the time of the collision?

A. Not quite, no; almost dead in the water.

Q. Now, at eight knots per hour, how many feet does your vessel make per minute—roughly 800 feet a minute, isn't that right?

A. Yes, eighty-five hundred. [73]

Q. That is right; about eighty-five hundred feet per minute at eight knots.

Mr. Henke: I didn't get those figures.

The Witness: About sixty-five hundred.

Q. (By Mr. Long): Yes; about 6500 feet per minute.      A. 650.

Q. I think it is near eight hundred; but you say 650 and that is close enough for my purposes.

A. Yes.

Q. So in three minutes she would move roughly 1950 feet, would she, at that speed?

A. Yes, sir.

Q. That is a little better than a third of a mile, isn't it?

A. Are you taking into consideration that our wheel is right over and that the ship is running in a circle which slows us down?

Q. Somewhat. I am also taking into consideration that you are in a 4-knot current, too. I am thinking that even in still water at eight knots you

(Testimony of Lawrence A. Parks.)

were progressing about 650 feet per minute so in three minutes that would be 1900 plus feet which is something over a third of a mile, isn't it?

A. Yes, sir. [74]

Q. The Eastern Prince sustained substantial damage in this collision, did she not, Captain, to her stern—her port quarter?

A. I don't know just what the actual damage was.

Q. I don't know whether you made a survey. But she was damaged so that she couldn't proceed on her trip, was she not?

A. When I left, they were talking about proceeding on. Whether they did or not, I don't know.

Q. Your vessel was a steel vessel, was it not?

A. Yes.

Q. And the Eastern Prince was made of what material, her hull?

A. Wood.

Q. And the point of contact, as I understand your testimony, your stem or bow struck the Eastern Prince on her port quarter?

A. That is right.

Q. That would mean aft on her portside or left side, would it not?

A. Yes, sir.

Q. And at that time the Eastern Prince was turning to her right and you were turning to your left?

A. Yes, sir.

Q. In other words, you were both turning toward the eastward [75] side of the channel?

A. Yes, sir.

(Testimony of Lawrence A. Parks.)

Mr. Long: I think that is all. Thank you.

### Recross-Examination

By Mr. Henke:

Q. With regard to the fishing vessels which were in this area during all of the period that you were navigating these waters during the war, the fishing vessels were following their regular routine. were they not, of fishing in Alaska waters and the canneries were operating as usual?

A. I believe so.

Q. And these fishing vessels, of course, were operating both inside and outside of the passage-way?

A. I couldn't swear to that. I was always inside.

Q. But you are acquainted with the fact that during this entire period the Alaska cannery operations carried on in the same manner?

Mr. Long: That is not quite accurate there. They didn't. I don't know if the witness knows or not, but I know they didn't.

Mr. Henke: We may have to put you on.

Mr. Long: All right. I can testify to that. [76]

Q. (By Mr. Henke): So far as you know, the the fishing vessels operated in a normal manner in those waters, during the years you were there?

A. A lot of them didn't. For the Navy I took over about fourteen of them at Sitka and put Navy



(Testimony of Lawrence A. Parks.)

crews on them and ran them as patrol boats; so they weren't fishing then.

Q. I see. But the canneries were operating to the full extent that conditions permitted—they were operating in the normal business of canning salmon?

A. I believe some of them were operating.

Q. The taking of the vessels by the Navy was for the convenience of the Navy and not because the vessels were unable to operate in the cannery trade, isn't that it?

A. They were taken for the convenience of the Navy. That is it.

Mr. Henke: That is all.

#### Further Redirect Examination

By Mr. Long:

Q. Captain, as a matter of fact, some of the fishing vessels were made Coast Guard Auxiliary vessels while they were fishing, were they not? [77]

A. I don't know as to that. When war was declared, I was stationed at Sitka at that time, and we went out and grabbed every boat in the harbor that was suitable for the work we wanted done, in Alaska.

Q. That was true of all vessels, fishing vessels, barges, and so on, was it not?

A. That it right.

Mr. Long: That is all.

(Witness excused.)

Mr. Long: I called Captain Veusler. His testimony will be very short. I asked him to come tomorrow morning. We do have a witness now that we can call and he will be here very shortly.

The Court: We will take a short recess in this case.

(Short recess.)

Mr. Long: Captain Rose of the Eastern Prince was here all morning. He may have taken sick during the noon hour. I have another witness I can call.

The Court: All right. You may put him on.

Mr. Morrow: Mr. Mills, take the stand. [78]

### DEAN ELWOOD MILLS

called as a witness by and on behalf of the libelants, having been first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Morrow:

Q. Will you state your full name?

A. Dean Elwood Mills.

Q. Where do you live?

A. Richmond Beach, Washington.

Q. What was your occupation in May, 1942?

A. I was a seaman aboard the Eastern Prince.

Q. What was the voyage of the Eastern Prince at that time?

A. The voyage was carrying supplies for the

(Testimony of Dean Elwood Mills.)

Alaska Road up the inside to Alaska for the Elliott Steamship Company.

Q. What was the nature of the cargo of the Eastern Prince?

A. Construction equipment, food, insulating material, lumber—just about everything they need for general construction work.

Q. What are you doing now, Mr. Mills?

A. I am going to the University of Washington, the College of Pharmacy.

Q. What is your age? [79]

A. Twenty-four.

Q. What licenses did you hold in May, 1942?

A. At that time I held ordinary seaman's certificate.

Q. That is the license issued by the Department of Commerce, is it?      A. That is right.

Q. Will you just tell the court what your duties were aboard the Eastern Prince on the morning of—midnight, rather, of May 10th and the morning of May 11th, 1942?

A. I was the Quartermaster.

Q. What was your watch?

A. My watch was ordinarily 12:00 to 2:00, but because I was the most experienced helmsman aboard the ship, Captain Rose carried me over into the next watch to go through Seymour Narrows.

Q. Where is Seymour Narrows located?

A. Between Vancouver and British Columbia, the northern part.

(Testimony of Dean Elwood Mills.)

Q. What is the name of the Passage?

A. Discovery Passage.

Q. What does the Quartermaster do?

A. The Quartermaster is the helmsman. He steers the ship.

Q. Under whose orders? [80]

A. Under the Officer on watch who at that time was Captain Rose.

Q. Was there anybody else in the wheelhouse at midnight, May 10th, or the morning of May 11th besides yourself and Captain Rose?      A. No.

Q. Would you tell what happened from the time you entered Discovery Passage northbound, Mr. Mills?

A. We entered Discovery Passage on the right side of the channel at a course of 212 degrees magnetic. We put Cape Mudge on our——

Q. Before you entered on this course of 312 magnetic, what did the vessel do with respect to the tides?

A. We laid to outside of the channel, waiting for the tide from Seymour Narrow.

Q. What time were you waiting outside the channel?

A. That would be right around 12:00 or 12:30 a.m.

Q. You state that you passed Cape Mudge after that to go through Seymour Narrows?

A. That is right.

Q. About what time was that?

A. That was about 1:15.

(Testimony of Dean Elwood Mills.)

Q. That would be a.m.? A. A.M.

Q. On May 11th? [81] A. That is right.

Q. On passing Cape Mudge, what course were you on? A. I was on 212 magnetic.

Q. Was that 212 or 312?

A. 312, rather; I am sorry.

Q. What speed was the Eastern Prince making through the water?

A. We were making between seven and eight knots.

Q. Was there any current at the time?

A. Yes. There was a rather strong tide running south out of the channel.

Q. What was the speed of the tide?

A. Well, approximately four knots.

Q. What would your speed then be over the ground?

A. Well, our speed over the ground would have been between three and four knots.

Q. After passing Cape Mudge, did you receive any orders from Captain Rose?

A. After we had proceeded well up into the channel, he ordered me to put the wheel over to the right, which I did; and after a few seconds he ordered the wheel steadied. As he ordered the wheel right, he gave one long blast on the air whistle.

Q. After you steadied, were there any further orders or observations which you made? [82]

A. My only observation at that time was mental, I presumed we were maneuvering for some reason;

(Testimony of Dean Elwood Mills.)

I didn't know what. Shortly after that, he ordered the wheel hard right and blew another blast.

Q. Did he make any remarks or say anything at that time?

A. He didn't say anything until just before the collision.

Q. Did you see anything yourself at that time?

A. As soon as I had put the wheel hard over, I looked up and I saw a red light coming towards us.

Q. Did you find later that was the port light of the Roustabout?      A. That is right.

Q. And by port you mean the left light?

A. The left light.

Q. Prior to the time that you made the first change of course to the right, what was the course of the Roustabout with respect to mid-channel?

A. What was the course of the Roustabout?

Q. Yes; with respect to her position in the channel?

A. Well, the Roustabout was left of mid-channel.

Q. Whose left of mid-channel?

A. His left. He was to our right of mid-channel.

Q. By that I take it that you mean that the Eastern Prince was closer to the east shore of the channel?      A. By far. [83]

Q. Where was the Roustabout with respect to mid-channel?

A. The Roustabout was east of mid-channel.

Q. The Roustabout likewise was east of mid-channel?      A. That is right.

Q. About what time did the collision occur?



(Testimony of Dean Elwood Mills.)

A. About 2:15 a.m.

Q. Approximately where did the collision occur?

A. About an eighth of a mile from the east shore and about directly across from the Campbell River.

Q. Is that referred to as the Campbell River Bluff?

A. I think we were a little bit south of the Bluff yet but a little bit north of the town.

Mr. Morrow: Would you kindly mark the exhibit as Libelants' Exhibit 2?

(Hydrographic map of Discovery Passage marked Libelants' Exhibit 2 for identification.)

Q. (By Mr. Morrow): I hand you herewith, Mr. Mills, what has previously been marked Libelants' Exhibit 2. That is the chart before you. Can you identify the same? A. Yes.

Q. What is it?

A. That is a chart of Discovery Passage and Seymour Narrows.

Q. In British Columbia waters?

A. In British Columbia waters. [84]

Q. Is that an official chart? A. Yes, it is.

Q. Would you just take this red pencil, Mr. Mills, and indicate by a number "1" the approximate position the vessel was in while it was waiting for the tide in Seymour Narrows? Just make it a big "1" and put a circle around it.

A. (Witness writes on map.)

Mr. Morrow: I would like to offer this chart in evidence.

Mr. Henke: We have no objection to this chart.

(Testimony of Dean Elwood Mills.)

The Court: It may be admitted as Libelants' Exhibit 2.

(Libelants' Exhibit 2 received in evidence.)

Q. (By Mr. Morrow): What was the Eastern Prince doing at Position 1 of Libelants' Exhibit 2?

A. We were laying to, waiting for the tide to slack up coming out of the Narrows.

Q. Were you at anchor?

A. No. We were drifting.

Q. You have testified, as I recall, that you passed Cape Mudge about 1:15 a.m.

A. That is right.

Q. Will you indicate the vessel's approximate position [85] at the time she passed abeam of Cape Mudge by the number "2," with a circle around it in red pencil?

A. (Witness writes on map.)

Q. Would you please indicate also in a red pencil in a red cross the approximate position of the collision of the vessels?

A. (Witness writes on map.)

Q. At and prior to the collision, Mr. Mills, just where were you stationed on the Eastern Prince?

A. Prior to the collision?

Q. At and prior?      A. I was at the wheel.

Q. At all times at the wheel?      A. Yes.

Q. What time did you go on watch at the wheel?

A. 12:00 midnight.

Q. So that you had been at the wheel approximately two hours before the collision occurred?

A. That is right.

(Testimony of Dean Elwood Mills.)

Q. Were you in such a position that you could have heard any signals that might have been blown by the USS Roustabout? A. Yes.

Q. Did the USS Roustabout blow any whistles prior to the time of collision? [86]

A. I didn't hear any.

Q. Did she blow three when she went astern?

A. No.

Q. Prior and at the time of the collision, Mr. Mills, did you observe the condition of the lights aboard the Eastern Prince?

A. Yes; I checked the lights before I went on watch.

Q. What did you find on checking the lights of the Eastern Prince?

A. The lights were all burning brightly.

Q. Which lights were burning brightly?

A. The port and starboard running lights, and the white light on the masthead.

Q. When you refer to the port and starboard running lights you are referring to the red and green running lights, I take it?

A. That is right.

Q. Which is the red and which is the green?

A. The red is the port light.

Q. Which is the green?

A. The starboard light.

Q. Were there any other lights on the Eastern Prince showing?

A. There were two outside lights hanging under the overhang of the bridge. [87]

(Testimony of Dean Elwood Mills.)

(Photograph marked Libelants' Exhibit 3 for identification.)

Q. (By Mr. Morrow): I hand you herewith what has been marked Libelants' Exhibit Number 3 and ask you if you recognize the same?

A. Yes; this is the Eastern Prince.

Q. Is that a photograph of the Eastern Prince?

A. Yes.

Q. Is Libelants' Exhibit Number 3 a fair reproduction of the Eastern Prince as she existed in May, 1942?

A. Yes.

Mr. Morrow: I offer Libelants' Exhibit 3 in evidence.

Mr. Henke: No objection.

The Court: It may be admitted.

(Libelants' Exhibit 3 received in evidence.)

Q. (By Mr. Morrow): Would you please take a red pencil, Mr. Mills, and indicate by a cross the position of the running lights or running light as you see them in Libelants' Exhibit 3?

A. (Witness writes on map.)

Q. Would you run a line out from that cross in red pencil, up in here—or I will do it—and an arrow with a Figure "1," the cross indicating the position of one [88] of the running lights of the Eastern Prince?

(Mr. Morrow writes on map.)

Now, can you tell whether that is the starboard or the port running light?

A. That is the starboard light.

Q. At the time and shortly prior to the collision,

(Testimony of Dean Elwood Mills.)

was that light burning brightly? A. Yes.

Q. And was it visible to vessels ahead?

A. Yes.

Q. The Eastern Prince, I understood, carried a deck cargo on this particular voyage, did it not?

A. That is right.

Q. State whether or not the deck cargo obstructed the view of the running light in question?

A. No, it did not.

Q. How high did the deck cargo come up on the vessel?

A. The deck cargo didn't quite reach the level of the deck of the bridge.

Q. And you can so indicate that on Libelants' Exhibit 3, can you not? A. I can.

Q. Will you do so in red pencil?

A. (Witness writes on map.)

Q. Opposite that I will indicate a figure "2." (Mr. Morrow [89] writes on map)—to show the level of the deck cargo.

Was the port light or the green light likewise burning clearly? A. Yes, it was.

Q. The starboard light I meant,—green light?

A. Yes.

Q. And the port light was burning brightly?

A. Yes.

Q. Both were burning brightly?

A. That is right.

Q. After the collision occurred, what happened?

A. Well, after the collision occurred, Captain Rose sounded a general alarm. I made my way back

(Testimony of Dean Elwood Mills.)

to the starboard life boat and took the canvass off and stood by there.

Q. Did Captain Rose make any remarks at the time of the collision or shortly before?

A. Well, just before the collision he was looking out the window—that was about the time that the bow of the ship itself became visible—and he said “The dirty blanks are going to hit us.”

Q. Could you tell, Mr. Mills, whether the Roustabout had changed her course before she hit you?

A. Well, no, I couldn't tell whether she had or not. [90]

Q. Did it appear that she might have?

A. Well, I couldn't really swear to it because I was busy with that handwheel.

Q. How was she approaching when you saw her?

A. The Roustabout, when I saw her, was coming across the Channel heading in a southeasterly direction.

Q. Where and how did the vessels come in contact with each other?

A. Well, the vessels contacted about an eighth of a mile from the eastern shore,—her bow against our port quarter.

Q. By port quarter what do you mean?

A. The after rear.

Q. Do you mean the stern?      A. The stern.

Q. Near the stern?      A. On the left side.

Q. What side of the Eastern Prince was struck?

A. The left.

Q. Could you describe just the angle of the collision?



(Testimony of Dean Elwood Mills.)

A. The angle of collision was somewhere between, oh, thirty-five and forty-five degrees,—closer to forty-five degrees, I believe.

Q. In which direction was the Eastern Prince headed or what was she doing at the time of the collision? [91]

A. Well, at the time of the collision she was playing very rapidly towards the right.

Q. And that would be towards the east shore?

A. Towards the east shore.

Q. Approximately how far did she come from the east shore?

A. Do you mean how far was she from the east shore?

Q. How far was she from the east shore on her swing?

A. We started the swing at around a quarter of a mile, so it was something less than an eighth of a mile; perhaps a tenth or an eleventh of a mile.

Q. Could you see the shore?

A. Well, if I had had to look, I could see it, but I didn't pay much attention to it.

Q. How far was the Roustabout from the shore?

A. I could tell she was coming at a pretty good clip.

Q. Could you tell if she was swinging?

A. No, because all I could see was her red light and after I saw the red light it was too late to make calculations.

Q. Where did the Eastern Prince go after the collision?

(Testimony of Dean Elwood Mills.)

A. The Eastern Prince tied up at the Campbell River dock.

Q. Where did the Roustabout go?

A. The Roustabout, as I remember, dropped her anchor just off the dock. [92]

Q. Was there any conversation between the officers of the Roustabout and those of the Eastern Prince, Captain Rose, carried on in your presence?

A. Yes. Captain Parks from the Roustabout and some officer came to shore on the dock and from the Eastern Prince.

Mr. Henke: I think I should object to this as improper as to any conversations between the officers after the accident occurred. We are not bound by conversations of either one. It is merely something that happened afterwards.

Mr. Morrow: It is part of the *res gestae*. I can bring out from the conversation that occurred immediately after the collision within a short time. In addition to that, the Rules of Admiralty permit a very wide latitude in respect to such questions. The ordinary rules of questions with respect to law do not apply. Certainly this witness should be permitted to answer such a question.

Mr. Henke: You should lay a foundation as a part of the *res gestae*, as to how long it took them to get into the Campbell River, and so on.

The Court: Could you lay a better foundation?

Mr. Morrow: I will be glad to do so. [93]

Q. (By Mr. Morrow): How long after the collision occurred did you overhear this conversation?

(Testimony of Dean Elwood Mills.)

A. I would judge shorter than an hour; very little shorter.

Q. How long did it take you to get into the Campbell River after the collision?

A. Well, it didn't take very long to get in but it took a little time to survey the damage to find out if we could get in. That, I would say, took ten minutes. Then we had to dock and the Roustabout had to send a boat in.

Q. How long after Captain Rose met the officers of the Roustabout did the conversation occur?

A. Immediately. There was no delay there.

Q. I will ask you what the officers of the Roustabout said with respect to the collision?

Mr. Henke: We renew our objection that it is irrelevant, incompetent, and immaterial.

The Court: I am a little bit at a loss to,—I will put it this way: I doubt that it is a part of the *res gestae*. But I am a little bit at a loss to see the force of the objection. You state that you would not be bound by an admission. On what do you base that?

Mr. Henke: Well, these officers, so far as they are concerned of the vessel, are officers. They [94] are not agents or representatives of ours.

The Court: Don't you stand in the same position as one of the parties in this case?

Mr. Henke: Well, we are one of the parties but——

The Court: As one of the parties to the collision, don't you represent——

Mr. Henke: No. Our position, your Honor, is

(Testimony of Dean Elwood Mills.)

that we are merely insurers of the Eastern Prince. The question is whether or not she has suffered a war risk. As such,—the naval officers are no agents of ours and we have no responsibility for what they may do or say. Our position is that it is not an admission from any agent or representative of ours that they are attempting to quote.

Mr. Morrow: May it please the Court, in Admiralty matters, the Court is entitled to have the full story of a collision or any maritime matter. It certainly should have the story on this occasion.

Reading from Benedict, Section 381 B(5), it is stated:

“Admiralty causes are tried by a single judge without the aid of a jury. Hence the elaborate rules of evidence deemed necessary to protect the untrained jury are not required. Courts of Admiralty are not bound by all the rules of evidence which are applied in courts of common law and they may, where justice requires it, take notice of matters not strictly proved and may receive in evidence testimony which might not be admissible in other courts.”

Now, cases go on and on along that same vein. In the event of appeal in this case, why, the Circuit Court would try the matter *de novo*. They likewise are capable of determining the value of evidence. They want the full story. If this evidence is in any way irrelevant, immaterial, or incompetent, it is presumed that the court will judge its value and

(Testimony of Dean Elwood Mills.)

certainly the Circuit Court should be presented with the same opportunity.

The Circuit Court has the right to take even additional evidence. But for that reason, if for no other, all of the evidence that has any bearing on the subject is generally admitted in a trial of Admiralty matters.

The Court: The objection will be overruled. You may answer the question.

Mr. Henke: May an exception be noted, [96] your Honor?

The Court: Exception noted.

Mr. Morrow: I will re-ask the question.

Q. (By Mr. Morrow): What was stated by the officer or officers of the Roustabout on this occasion?

A. I heard Captain Parks tell Captain Rose that he hadn't seen the Eastern Prince until he was right on top of her.

Q. Did he have anything to say with respect to his officers on deck?

A. Well, I did hear him make the remark that he didn't have an officer of experience or responsibility on his bridge.

Q. Did he state the reason why he didn't?

A. Well, he said that they were all naval reservists who had never been to sea before.

Mr. Morrow: You may inquire.

Cross-Examination

By Mr. Henke:

Q. Captain Parks himself was on the bridge, wasn't he? A. He was.



(Testimony of Dean Elwood Mills.)

Q. Were you acquainted with Captain Parks' experience in [97] the navigation of Alaska waters?

A. No, I am not.

Q. You referred to the conversations, Mr. Mills. Do you recall that on or about May 15th, 1942, at Vancouver, B. C., you gave a statement as to how the accident occurred.

A. I believe I recall making a statement there.

Q. Your statement at that time, in regard to Captain Parks was as follows—was it not—"Some of the officers of the Roustabout were talking to Captain Rose on the dock at Campbell River. I heard them say to Captain Rose that they did not see any of the running lights of the Eastern Prince until right on top of her. At that time all of the running lights of the Eastern Prince were still burning brightly. The officers of the Roustabout said to Captain Rose, 'We did not see your running lights until we were right on top of you.' "

Is that a fair statement of your recollection on May 15th, 1942, of what the officers of the Roustabout said?      A. I believe that is very close.

Q. You would say that this statement that you gave on May 15th, 1942, would be a more accurate statement than your recollection at this time, would you not? [98]

A. Well, I don't think that is necessarily so because I have read my statements that I made at that time,—I made several—in very much detail and I have refreshed myself with them.

Q. When you gave this statement on May 15th,



(Testimony of Dean Elwood Mills.)

1942, you did not at that time recall or set forth any reflection by Captain Parks upon the competency of his officers, did you?

A. I was never asked.

Q. As I understand your testimony, there were only two of you on deck on the Eastern Prince at the time of the collision,—yourself and Captain Rose?

A. That is right.

Q. Where were you situated?

A. At the time of the collision?

Q. Yes. A. I was at the wheel.

Q. Where is the wheel situated?

A. The wheel is situated on the bridge.

Q. Could you take that exhibit—I believe it is 3—that you have there, and mark on it the approximate location of the wheel?

A. That is right. Mark that in red pencil?

Q. Yes; it would probably be “3,” would it?

A. It is very difficult to mark it on this because this [99] isn't a flat view. It is taken from the stern. The front of the pilot house or a straight angle of the pilot house isn't visible on this picture.

Q. Is the pilot house on the Eastern Prince level with the deck?

A. As I recall, there was one or two steps up into the bridge from the boat deck.

Q. As I recall your testimony, you did not see the Roustabout until she was practically on top of you, is that right?

A. Not at all. I saw the lights of the Roustabout—the red light—sometime before she was on

(Testimony of Dean Elwood Mills.)

top of us. I didn't see the Roustabout, herself, until she was right on top of us.

Q. As I have the statement here, your recollection on May 15th, 1942, was as follows—will you state whether this is correct or not—“We had proceeded on this course for approximately one hour or more but Captain Rose ordered me to put the wheel to the right, which order I immediately obeyed. In about 15 or 20 seconds after this order, the Captain blew one long blast on the air whistle. At this time I did not see the approaching vessel but sensed that one was coming towards us in view of the wheel order and the blast of the whistle. After the long blast [100] on the whistle, I received an order from Captain Rose to steady the wheel, which I did. Then Captain Rose gave a sharp order to put the wheel hard right and keep it there, which I did at once. After putting the wheel hard right, then I looked up and saw the red light of an approaching vessel.”

A. That is right.

Q. Isn't that an accurate statement of your recollection of what occurred?

A. It is very close.

Q. So that actually you didn't see the red light on the Roustabout until Captain Rose had given you the order to turn hard right?

A. That is correct.

Q. And that was the first time that you saw even the lights on the Roustabout?

A. That is right.

(Testimony of Dean Elwood Mills.)

Q. You stated, I believe, that this wheel on the Eastern Prince was a hand-operated wheel?

A. That is right.

Q. Do you mean by that that the entire force for turning the rudder is furnished by the helmsman?

A. The helmsman and a good deal of leverage on the rudder arm.

Q. That is, there is no steam to help turn it but the [101] pressure by the helmsman is what turns the rudder? A. That is right.

Q. As Quartermaster, was it one of your duties to maintain a lookout forward?

A. My main duty as Quartermaster was to watch the compass.

Q. Watch the compass and turn the wheel as directed by the Captain? A. That is right.

Q. Where was Captain Rose with respect to yourself?

A. Captain Rose was on my left, forward immediately of the cabin housewindows.

Q. Referring to the deck cargo which was on the Eastern Prince, what was the nature of this cargo? A. Lumber, crates.

Q. What type of lumber, do you recall?

A. I think it was mostly large, rough two by twelves and one by sixes and two by sixes.

Q. You say two by twelves and——

A. Two by sixes. It was more or less of a mixed deck cargo of lumber, with crates and that sort of thing thrown in.

(Testimony of Dean Elwood Mills.)

Q. Aft on your vessel there were a number of lights on the deck, were there not?

A. To the best of my knowledge there was one light on either side directly under the overhang of the bridge. [102]

Q. There was one electric light on each side directly under the overhang of the bridge?

A. That is right.

Q. Were those lights visible forward?

A. No.

Q. That is you wouldn't anticipate that an on-coming vessel could see those white lights?

A. I hardly think so.

Q. Why not?

A. Because the deck cargo came up to within a few inches of the level of the bridge deck, which the lights were a foot or a foot and a half under the deck of the bridge.

Q. I take it from what you say that the Eastern Prince had a passageway on the deck on each side of the pilothouse?      A. That is right.

Q. And the overhang from the deck on top of the pilot house was extended out, was it?

A. That is right.

Q. Then attached to that overhang were these white lights?      A. That is right.

Q. They, in your opinion, were not visible forward because the deck cargo came up to the top of the—— [103]

A. ——within a short distance of the top, that is right.

(Testimony of Dean Elwood Mills.)

Q. —of that area? A. Yes.

Q. Were there any other lights aft of that?

A. Well, there may have been a light in the galley. The galley was aft on the main deck.

Q. But this would have been inside of the vessel?

A. That would have been porthole lights.

Q. There were no other exposed lights on the deck? A. On the deck, no, sir.

Q. Other than these two white lights which were alongside of the pilothouse?

A. That is right.

Q. Now, as I understand, your first order that you had from Captain Rose was to turn hard right and then some twenty seconds or so later he gave you an order to sound your air whistle?

A. No. The first order was not a hard right signal. The first order was a right signal.

Q. Yes; you are right. After that order to turn to the right, there was an interval and then he ordered you to blow the whistle?

A. As I recall, Captain Rose blew the whistle himself, while I was getting her hard over.

Q. As I have your previous statement, it was "About 15 [104] or 20 seconds after this order, the Captain blew one long blast on the air whistle." That was after your first turn to the right.

How long an interval would you say it was between Captain Rose's first order to you to steady the wheel and his second order to turn hard right?

A. Well, that is rather hard to say but it was under a minute. It was just a matter of seconds.

(Testimony of Dean Elwood Mills.)

Q. In other words, the whole incident was over in a matter of a very few minutes?

A. Well, I have to allow time to get that wheel over but it was a short time.

Q. Getting that clear: You had the first order from Captain Rose to turn the wheel to the right?

A. Right.

Q. And you immediately proceeded to do that immediately upon his order?

A. That is correct.

Q. Then about twenty seconds after that the Captain sounded one blast on his air whistle?

A. Well, the blast on the air whistle was while I was getting on the course,—just a matter of seconds; I didn't know just how many.

Q. Do you mean while you were turning right and getting steady on the course? [105]

A. As I remember, the whistle was blown as I steadied on the course.

Q. Then you steadied on the course and just a few seconds after that he gave the order hard right?

A. That is right.

Q. I didn't understand you very clearly when they asked you the question as to your acting as helmsman, here. I think you said that Captain Rose had you stand an extra watch, did he, because you were the most experienced helmsman he had?

A. Not an extra watch,—part of an extra watch. I was to stand by at the wheel until such time as we were through the Narrows.

Q. When would your watch normally have ended?      A. At 2:00 o'clock.



(Testimony of Dean Elwood Mills.)

Q. At 2:00 o'clock? A. In the morning.

Q. So he was having you continue on after your watch until the vessel got through this particular area, is that right? A. That is correct.

Q. How long would you have continued then?

A. I would say another fifteen minutes or twenty minutes, something like that. It depends on how we had to maneuver to get through the Narrows.

Q. I believe you said that you are twenty-four now? A. That is right.

Q. Then you would have been nineteen in May of 1942? A. That is correct.

Mr. Henke: I believe that is all.

Redirect Examination

By Mr. Morrow:

Q. Mr. Mills, I believe you stated that the Eastern Prince was loaded? A. That is correct.

Q. By reason thereof, did she set low in the water?

A. Well, she didn't set too low. She was a wooden ship and they don't set too low.

Q. How did she compare to the Roustabout?

A. Very much lower than the Roustabout.

Q. Those from the bridge of the Roustabout, in viewing the Eastern Prince, would have an angle of vision, would they? A. They would.

Q. What would be the nature of that angle?

A. Officers on the bridge of the Roustabout would have looked down on the bridge of the Eastern Prince.

Q. Would that have better enabled them to view

(Testimony of Dean Elwood Mills.)

the running [107] lights of the Eastern Prince?

A. Yes, it would.

Q. I believe Mr. Henke asked you if these little white lights were on top of the pilot house. I got your answer that they were and I would like to clear up just the exact position of these little white lights. You have before you Libelants' Exhibit 3 showing the Eastern Prince. Will you take and indicate thereon, if you can, the position of the white lights in question? Make a little round circle and then draw a line out over here and mark it "3."

A. I thought I stated that they were under the overhang. (Witness draws on photograph.)

Q. That clears it up then. And it is understood that the white lights in question were under the overhang of the boat deck; is that correct, Mr. Mills?

A. That is correct.

Q. With respect to the running lights——

The Court: Is that the overhang of the boat deck?

The Witness: Of the boat deck.

Q. (By Mr. Morrow): Would you just make another line and mark it "4" and show the level of the boat deck?

A. (Witness draws on photograph.)

Mr. Morrow: The witness has indicated the boat deck by running an arrow to the level of the boat deck.

Q. (By Mr. Morrow). With respect to the elevation of this small white light in question which is under the overhang of the boat deck, is that light

(Testimony of Dean Elwood Mills.)

of lower or higher elevation than the red and green running lights?      A. Lower.

Q. Approximately how much lower?

A. At least two and one-half feet,—three feet; easy three feet. We had elevated running lights.

Q. I believe it was your testimony that the deck cargo was in such position that it covered the little white lights which were under the overhanging boat deck?      A. That is right.

**Mr. Morrow:** No further questions.

Recross-Examination

By Mr. Henke:

Q. Did the deck cargo come up to the level of the boat deck or above the boat deck?

A. As I recall, it was very close. You had to step down two or three inches to get down from the bridge deck to the boat deck.

**Mr. Morrow:** You said the bridge deck? [109]

**The Witness:** That is the boat deck.

**Mr. Morrow:** That is the boat deck.

Q. (By Mr. Henke): So that when you stepped out of the pilot house on the Eastern Prince, you could walk over to the edge of the boat deck and step down approximately one foot——

A. No; somewhat less than a foot.

Q. Something less than a foot?

A. Something less than a foot.

**The Court:** Didn't you say two and one-half inches?

**The Witness:** Two or three inches, something like that; it was just a little bit lower.

(Testimony of Dean Elwood Mills.)

The Court: Which is it,—a foot or two and one-half inches?

The Witness: It is just about two and one-half inches.

Further Redirect Examination

By Mr. Morrow:

Q. As I understand, the pilot house is a little above the boat deck?      A. That is right. [110]

Q. How far?

A. I believe there were two steps.

Q. Two steps?

A. From the boat deck to the pilot house deck.

Mr. Morrow: That is all.

Mr. Henke: That is all.

(Witness Excused.)

Mr. Long: Your Honor, Captain Rose has been quite ill during the last few months and was taken ill during the noon hour. I haven't had a chance to find out whether he can resume the stand or not. He collapsed over in Frederick & Nelson's store.

I will ask him if he would like to take the stand now.

(Short recess.)

The Court: You may now proceed, gentlemen.

Mr. Morrow: I will ask Captain Rose to take the stand. [111]

GEORGE WILLIAM ROSE

called as a witness by and on behalf of Libelants, having been first duly sworn, was examined and testified as follows:

(Testimony of George William Rose.)

Direct Examination

By Mr. Morrow:

Q. Your first name is George W. Rose?

A. George William Rose.

Q. I understand that you had an attack during the day. You were here this morning, weren't you?

A. Yes.

Q. Do you feel all right,—like you can go on now?

A. Yes, I do.

Q. How old are you, Captain?

A. Seventy-five.

Q. Have you had an illness since this collision occurred?

A. I retired from marine work three years ago. Two years of that I was sick. I am convalescent now and getting along first rate. I tire very easily.

Q. Prior to your illness, what was the condition of your hearing?

A. My hearing before I retired was very good. That is one of the reasons of my retirement was my hearing commenced to get poor. [112]

Q. Captain, what licenses do you hold?

A. I hold a Master's Unlimited License, any tonnage, any waters; and Pilot License for Puget Sound and Southeastern Alaska. Here is my license, if the Court wishes to see it. (Witness indicates document.)

Q. Thank you very much, Captain.

How long have you been going to sea, Captain?

A. Fifty-five years.

(Testimony of George William Rose.)

Q. How long did you go to sea under a Master's ticket?

A. I had my Master's Ocean License since shortly before the first World War,—some thirty odd years now. I have had some form of license since 1892. That is forty-five years ago.

Q. On May 11th, 1942, you were Master of the Eastern Prince?      A. I was.

Q. What voyage was she on, on that occasion, Captain?

A. On her first voyage under the ownership of Mr. Link.

A. Where did that voyage start and when?

A. That voyage was started in Seattle, where we loaded, and left there on the 10th of May, 1942.

Q. Where did the collision occur, Captain?

A. The collision occurred off a place known to mariners as Campbell River Bluff; right opposite Campbell River which empties into Discovery Passage in [113] Canadian waters.

Q. You have before you, Captain, what has been referred to as libelants' Exhibit Number 2. Is that **the chart from the Eastern Prince**, can you state?

A. I can't say as to where it originated, but it is a standard chart of the Edition of 1921 and has been the authorized navigation aid since that time.

Q. Was it that chart or an identical chart that you had aboard the vessel on the occasion of the collision in question?      A. It is.

Q. Captain, have you indicated on that chart the approximate point of the collision?



(Testimony of George William Rose.)

A. I have.

Q. How have you indicated that,—in blue pencil?

A. A red cross in a blue circle.

Q. There is a red cross in a blue circle; and that is whereabouts in what waters?

A. That is in the waters of Discovery Passage.

Q. Do you recall, Captain, the approximate time that collision occurred?

A. The collision occurred between 2:00 and 2:10 o'clock in the morning of May 11, 1942.

Q. Will you tell the court the circumstances that occurred leading up to the time of the collision?

A. Will you repeat your question?

Q. What were the circumstances, Captain, leading up to the time of the collision,—the navigation of your vessel and other circumstances prior to the time of the collision?

A. We were proceeding on a voyage from Seattle to Prince Rupert first port of call. We had bad weather the night we left,—bad weather crossing the Straits of Juan de Fuca. When we got up here we were what is called by navigators late on the tide which runs very swiftly in Seymour Passage. So I was idling along—that is running slow—when the Chief asked me if he could stop her to make some minor adjustments to the machinery and I said, yes. We drifted around off and a little south of Cape Mudge.

Q. Let the record show that the Captain is referring to an area which has previously been indicated by the witness Mills as a red “1” in a circle; is that correct?

A. Yes; about there.

(Testimony of George William Rose.)

Q. Then you started to go through Discovery Passage, did you, Captain?

A. Then, when he reported O.K., I started up at two-thirds speed because I was ahead of the time of slack [115] water at Seymour Narrows if I run full speed. The tide which ebbs south in this Passage at a very high speed was running south at the time.

Q. How fast, Captain?

A. I judge it was making in the Narrows about ten miles and down here about four or five miles.

Q. You have pointed to the vicinity of Cape Mudge?

A. Yes; down as far as Cape Mudge.

Q. How fast was the Eastern Prince traveling?

A. The Eastern Prince was going eight miles an hour on her engine revolutions.

Q. By that you mean through the water?

A. Through the water.

Q. What time was she making over the ground?

A. Four to five miles over the ground. With a head tide of four or five miles down here, that would give her four miles over the ground.

Q. Will you just go on from there Captain, and tell how the collision occurred; start out,—when did you first observe the Roustabout?

A. When I was pretty near up to Campbell River Bluff, I saw the lights of a vessel from three to five miles ahead of us coming south toward us. This vessel had very good lights,—excellent running lights, and the night was very clear, a beautiful

(Testimony of George William Rose.)

night. And I [116] had no trouble in distinguishing his lights. He came down showing his green light. That was all right with me. But I said to the Quartermaster, "We will get a little further over on our side of the Channel."

Q. Captain, when you saw his green light, how did that bear to your vessel?

A. Oh, I would say about three degrees off our port bow. Under "International Law" which is the strictest traffic law on the highway, vessels in a narrow channel are compelled by that law to stay on the right-hand side of the said channel. They can't cross over. If they do, why, they are just dead at fault for violating the fault. So I was hanging onto my side of the Channel,—the right-hand side—and was probably an eighth of a mile off of Campbell River Bluff or would be at the time I got there. At this time I was a little below it.

After I saw the green light, I went over to the right of the channel some more and then told the Quartermaster "Steady." That meant to line her up straight as she was going. He did that.

Q. Did you sound any whistle signals?

A. No, I didn't blow any signal then. The other vessel was too far away. But the other vessel was coming [117] down full speed with a flood tide and she was getting over the ground pretty fast; I should judge at least fourteen or fifteen miles an hour. She came down at that rapid pace and soon lessened the distance between us, while we were not much more than moving. Then he showed his red light again

(Testimony of George William Rose.)

which I argued to myself that he must have changed his course off Steep Island which would cause him to show me his red light. But he at that time certainly, if he had kept a good lookout, would have seen our red light.

Q. Did he blow any signals when he changed his course?

A. He did not. Then when he showed us his red light, I said to the Quartermaster "Hard a'port" and keep her there. What is that bastard going to do?" I shut out his red light again. I received no answer from the approaching vessel. Well, then, he had me checkmated. Under the law, I couldn't cross back. I couldn't blow him any other whistle. I couldn't use any other means of identification, and if I kept going the way I was I would be on the beach. So I said to Mills, the man that was at the wheel, "Let her come clear around and take them stern on."

Q. Which way were you swinging then, Captain?

A. We were swinging to the right as fast as the vessel could swing. [118]

Q. I take it that would be toward the east shore of the channel?

A. Yes. I was around so far then that I was heading a little bit to the right of the direct beam of the shore.

Q. Did you indicate your change in course by a whistle signal?

A. When I gave that order "Hard right" to

(Testimony of George William Rose.)

Mills, I reached up at the same time and blew a passing whistle; one whistle, five seconds duration.

Q. Captain, as a Master Mariner, state whether or not in your opinion that Discovery Passage in the vicinity of the collision is or is not a narrow channel under the International Rules?

A. Certainly it is a narrow channel. It is less than a mile in width.

Q. Were you navigating the Eastern Prince with respect to the narrow channel rule at the time?

A. I was navigating on International Rules which say that in a narrow channel, in any country anywhere in the world, one vessel coming and one going, each must stay on his own right-hand side away from the middle line of such channel. This channel here is three-quarters of a mile wide. A mid-channel course would be three-eighths of a mile from the center line. I was within [119] one-eighth of a mile of the shore, which was two-eighths between me and the center line. This fellow was coming down here and he hits me.

Q. Where was he in regard to that center line?

I would just like to have you answer that question, Captain.

Mr. Henke: If your Honor please, I don't like to object but I do think that Counsel is leading the witness rather decidedly. It is more of an argument as to what happened than as to the state of the facts.

Mr. Morrow: I don't think I am leading the witness. The witness is telling the story and I have asked him some questions and interrupted him.



(Testimony of George William Rose.)

Let's have the last question.

(Last question read by the reporter.)

The Court: The objection was to its being leading. The objection is overruled.

The Witness: I just want to explain to the Judge that in the investigation before the Inspectors I was held blameless.

Now that is supreme authority.

The position I state in this court is that I was blameless in this accident and I was in the right and my ship was in the right. The other fellow was in the wrong.

Mr. Henke: If your Honor please, I move it all be stricken as not responsive to the question.

The Court: It may go out,—that part of it.

Mr. Henke: I want to extend Counsel and the witness every courtesy but I——

The Court: That last remark of the witness may go out.

Q. (By Mr. Morrow): Captain, where was the Roustabout navigating; on what course was she navigating with respect to mid-channel at the time you first observed her?

A. Well, she was over on the left of the mid-channel.

Q. On her left?

A. And still going more to her left.

Q. By left, do you mean to the east?

A. To the east,—to her left.

Q. In other words, she was on your side of the channel?

A. Yes.



(Testimony of George William Rose.)

Q. Your side of the road?

A. That made me go to the right to stay within my rights.

Q. Did the Roustabout blow any whistle signals?

A. Never at any time.

Q. After the collision occurred, Captain, what did the [121] Eastern Prince do; did you make a survey of the damage and go some place, or what happened?

A. After the collision,—the point of collision?

Q. Yes.

A. Well, the engineer stopped the engine. I turned on the general alarm.

Mr. Morrow: Captain, do you feel O.K.?

The Witness: Yes.

The Court: Let him take his time.

A. (Continuing): We commenced to drift south with the current, back towards Cape Mudge. I told him to put out the port life boat, to get it ready,—swing it out. While they were engaged getting out the life boat, the chief engineer come up and says, “Captain, she is not making any water.” I said to him, “Then we won’t need to beach her.” He said, “No. I think she will get along all right.” There was some conversation and he went down below, still looking at things in general and getting ready in case something unexpected happened.

Mr. Henke: If your Honor please, I think Counsel should realize that this has nothing to do with the case at all. I am willing to extend every courtesy

(Testimony of George William Rose.)

but I think Counsel should correspondingly endeavor to cover the situation. [122]

Mr. Morrow: I will shorten it for the benefit of the witness.

Q. (By Mr. Morrow): Captain, I just want to ask you a few more questions in this case. I don't want to unduly burden your testimony here on the stand to make it inconvenient for you.

What damage occurred to the Eastern Prince by reason of the collision?

A. The bow of the Roustabout made a fracture in her about sixteen inches deep. If she hadn't been such a blunt-bowed ship, she would have cut half way through her. The bow shoved the whole stern section over and lifted it about six inches, displacing all of the timbers and breaking some of the ribs, crumpling up the deck planking and shifting the rudder stock so that we had to pry it back in place in order to make the vessel steer.

Then when we got to Campbell River in order that that part of the stern which was so weakened wouldn't fall off, taking the rudder with it, we took a winch cable and put it under that stern to hold that part up. It is a good thing we did so because it would have dropped off before we got back to Vancouver. [123]

Q. Did the Eastern Prince continue her voyage from that point to destination?

A. I beg your pardon?

Q. Did the Eastern Prince finish her voyage on that occasion?

(Testimony of George William Rose.)

A. She did not. I phoned immediately to the construction company who had her chartered for the government. They got in connection with the underwriters and the underwriters sent Captain Clark up there. He happened to be coming up there anyway on another case; and he surveyed us as we were made fast to the Campbell River dock, where we went after we were through inspecting the damage.

Q. Then you returned and went back to Vancouver?

A. We returned to Vancouver, where the cargo was discharged and we went into the McDonald Steamship Yard or Shipbuilding Yard and the stern was rebuilt.

Q. Captain, getting back to the condition of the Eastern Prince, what lights did she display aboard at the time of the collision?

A. The Eastern Prince had the bright white headlight and a red side light and a green starboard light,—red port light. These lights conformed to the law. On the after end of the main deck, as the vessel has only one mast, was a white light. It would only show aft to an overtaking vessel but would not show forward. Back on the overhang of the house, showing down on the alleyways of each side of the house, were two lights. These lights were on a 110 volt circuit with 25 watt bulbs enclosed in a glass cage and a bronze metal work screen for shielding. With a high deckload, these lights could only show down on the narrow space of the deck, an alleyway

(Testimony of George William Rose.)

about three feet wide. Those lights could not be seen forward of the beam.

Q. You mean by an approaching vessel?

A. By an approaching vessel. Because if they could have they would have blinded me in my navigation.

Q. Captain, with respect to your red and green running lights, do you know what size globe,—what size they were?

A. The running lights were regular government-inspected Frensel lens light. They had 50-watt lamps in them. The government issued——

Q. Do you mean they had 50-watt lamps before the collision sometime?

A. Before the collision.

Q. What size did they have at the time of the collision?

A. The government issued an order for all vessels to dim their lights. So I removed the 50-watt bulbs [125] and installed 25-watt bulbs; and that is what they had at the time.

Q. What agency or department of the government issued those instructions, Captain?

A. I think the Navy issued them to the Coast Guard because the Coast Guard makes announcement of certain regulations in relation to marine matters.

Mr. Henke: If your Honor please, I think if testimony is to be given as to certain Orders, the Orders themselves should be introduced rather than someone's recollection of some indefinite statement

(Testimony of George William Rose.)

that the Navy or Coast Guard or someone had issued an order.

There is no suggestion of that at any point in this case and I don't think it is properly introduced at this time.

Mr. Morrow: If Counsel insists, I can go into some further foundations, but under the liberal rules for admitting evidence in Admiralty cases, I think the Captain is well qualified.

The Court: I think the Captain was in a position at that time to know something about those Orders and the source from which they came. The objection will be overruled.

Q. (By Mr. Morrow): By your answer to the last question, [126] I take it to mean that you received your instructions—at that time anyway—from the United States Coast Guard?

A. I read it in the public press as issued by the Coast Guard.

Q. Do you likewise receive orders and instructions from the Coast Guard?

Mr. Henke: "from the public press."

A. No, not direct.

Mr. Morrow: You did not on this occasion receive it direct?

A. Not direct, no. I got mine through the newspaper.

Mr. Henke: To keep the record clear, I will move that all testimony with regard to this purported order be stricken as the witness' only knowl-



(Testimony of George William Rose.)

edge was from something he read in the newspaper.

The Court: Motion granted. It will go out.

Q. (By Mr. Morrow): At the time of the collision, Captain, how far would your 25-watt lights be visible by an approaching vessel?

A. Oh, I should say three miles.

Q. Captain, you have described Discovery Passage as a narrow channel. State whether in your opinion it is safe and practical to navigate on both sides of the [127] Channel; that is, the west side of the channel west of mid-channel as well as east of mid-channel.

A. There is the chart, and the chart gives "40 fathoms"; "52 fathoms" close to Campbell River Bluff; and it gives 34 fathoms on the opposite shore,—close to the opposite shore. That is water enough to navigate scows like that. Both sides of the channel are what are called "bold." You can go close to them.

Q. I take your answer to mean that it is safe and practical, in your opinion, to navigate——

A. On both sides of the mid-channel; perfectly safe.

Q. In Discovery Passage, where the collision occurred?

A. Yes, sir. In going back to Campbell River dock we had to navigate on the left-hand side.

Q. Did the Roustabout navigate over there, too; did the Roustabout navigate over to Campbell River, too?

A. The Roustabout came up and anchored off



(Testimony of George William Rose.)

Campbell River dock. They had to come up the left-hand side of the channel. I went into and tied up to the dock.

Mr. Morrow: You may inquire.

Cross-Examination

By Mr. Henke:

Q. Captain, the witness who was on the stand before testified that the deck load on the forward part of [128] your vessel came up within two and one-half or three inches of the top of the boat deck. Is that your recollection, too?

A. On the after part of the deck load, even with the boat deck, I stopped them from putting any more load on that part and then made them break off forward,—taper off, so that it was kind of going down, so you could get forward to handle the vessel's lines and winches and so forth.

Q. Would you say that there was about two and one-half inches between the top of the cargo on the forward deck and the boat deck?

A. No. My memory says it was just about even.

Q. There were two lights on the main deck on each side of the pilot house, were there not?

A. Those two lights were down on the main house, right off the engine room.

Q. They were on the alleyway on the main deck?

A. They showed under the overhang of the main deck house down onto the main deck of the vessel.

Q. Yes, that is right. And you would say that

(Testimony of George William Rose.)

they were about even with where your running lights were?

A. No, sir; they were not even. They were at least three feet below the running lights. [129]

Q. Yes. I was saying in respect to the—

A. The running lights are about three feet above the boat deck, with screens on. Very, very good lights.

Q. Your running lights, you say, were about three feet above the running lights on the main deck, is that right?

A. Repeat your question.

Q. Your running lights were about three feet above the white lights that were on the main deck?

A. Yes, sir; three feet or more.

Q. Would you say that they were about even,—that is, relative to the fore and aft position on the vessel,—the white lights and the running lights were about even, weren't they; that is, in relation to the front and rear of the vessel?

Mr. Morrow: Do you mean in the middle?

Mr. Henke: I don't know where his running lights were.

Mr. Morrow: The picture is up there. It shows.

The Witness: I don't quite get your question. Pardon me.

Q. (By Mr. Henke): Referring to these two white lights that were on the main deck, they were in about the same perpendicular position, were they not, with the running lights? [130]

Q. Where were they in relation to them?

(Testimony of George William Rose.)

A. As I stated they were down under the overhang of the boat dock——

Q. I realize they were down under the overhang; but in respect to the fore and aft position?

A. The first little white light was about six feet back of the running lights and the next was about ten feet further back from that. Neither one of them could be seen from forward and a ship would have to be almost a'beam before she could even see them.

Q. Were there four white lights, then?

A. Two on each side.

Q. Two on each side of the vessel?

A. Mister, if a man couldn't see the bright running lights and a bright headlight, he never in God's World could see those two little dim lights.

Q. They were both the same wattage, weren't they? A. What?

Q. Didn't you say that they were all 25-watt lights?

A. Yes. But one had nothing but a glass cage around it and the others were backed by a Frensel lens, which magnifies the light.

Q. But one was white and the other was colored?

A. The headlight was a Frensel lens light. If a man couldn't see that, he couldn't see those red and green [131] lights.

Q. Captain, would you say that when you were coming southbound at a distance of between two and three miles of the——

A. Wait a minute.

Q. I beg your pardon. Captain, would you say

(Testimony of George William Rose.)

that when the Roustabout was coming southbound at a distance of between two and three miles she showed a bright green light to you?      A. Yes.

Q. That indicated that if you continued on your respective courses, you would pass her on her starboard side or right side?

A. I would pass to her right, yes; that would be her starboard side.

Q. Now, the green light that you saw on the Roustabout was a very good light, wasn't it?

A. Excellent; almost as good as ours.

Q. At that time, when you saw the green light, you gave instructions to the Quartermaster of the Eastern Prince to turn to the right, did you not?

A. Yes.

Q. Now, your reason for doing that was that there were a number of fishing or motor vessels between you and the Roustabout, is that correct?

A. No, sir. My object in doing that was to present my red light to the approaching vessel and to get further over on my own side of the channel.

Q. Wasn't your recollection at that time that the Roustabout——

A. At that time the Roustabout had passed that fleet of fishing vessels that was south of them.

Q. Wasn't it your thought that the Roustabout was going to have to change its course in view of the existence of those small motor-craft there?

A. He might have changed his course. I knew, when his lights changed position, that he had changed his course when I thought he was off Steep

(Testimony of George William Rose.)

Island. Then he changed his course a second time. I couldn't understand that. The people on the Roustabout never saw any lights. They told me right at the time of the collision,—Harry Parks says, "George, I didn't see your lights at all,—no lights whatever." If he couldn't see our bright running lights, he never could see any other lights.

Mr. Henke: I will ask that the last statement be stricken as voluntary.

The Court: It may go out as not responsive.

Q. (By Mr. Henke): As I understand your testimony, as [133] you saw the Roustabout approach she was showing you a green light?

A. She showed us her green lights 'way off,—two or three miles.

Q. If you continued on the course that you were then on and she continued on the course she was then on, you both would have passed starboard to starboard, would you not?

A. I didn't change my course, and he changed his twice; by the change in the appearance of his light I judged that he had changed his course. When I changed my course, I blew him one whistle, but she never answered.

Q. Let me get this clear. You saw the Roustabout coming and when you first saw her you picked up her green light and if she had continued on her course and you had continued on your course you would have passed starboard to starboard, is that right?

A. We never would have got by each other. As



(Testimony of George William Rose.)

I edged in to the eastward, toward the shore on my side, he edged to his left, closer to the shore. What he did that for, I don't know.

Q. I just want to go over it step by step to get it clear in my mind. When you first saw the Roustabout, you saw her green light? [134]

A. Yes.

Q. Now, presumptively if you had continued on your course and the Roustabout had continued on her course, you would have passed starboard to starboard?

A. No; because she was coming this way and I was going this way (indicating). She was coming three points on my bow and I was going straight ahead. I was steering 312,—

Q. Why would you not have seen her port light then?

A. —and I never got off that because before it was time for me to change that course, the Roustabout had hit us.

Q. If the situation was as you recite there, why did you not see the port light of the Roustabout?

A. I saw the port light of the Roustabout afterwards. That showed to me, or at least in my silent presumption, that he had changed his course, and he had changed it to the left.

Q. You don't know that the Roustabout changed its course except that your position relative to his lights changed, then?

A. Well, I know he was just about off Steep Island and all the Alaska pilots change course there.



(Testimony of George William Rose.)

I presumed—I didn't know it for a fact—I presumed that he was changing course. That made me try to get [135] away from contact with him. But still I had to obey the law and stay on my own side.

Q. You presumed that he had changed course at that time because it was customary for Alaska pilots to change their course at that point, is that right?

A. Yes.

Q. Acting on that presumption, you turned to your right?

A. When I saw both of his lights, I would have to do something or he would run me down because he hadn't answered my whistle and he had me in a jackpot. So I went to the right. When I went to the right, hard a'port, I blew him one whistle.

Q. Well, at that time, if I understand your testimony, the Roustabout was from three to five miles from you, is that right?

A. Three to five miles.

Q. Is that correct—at the time you changed your course the Roustabout, according to your computation, was about three to five miles from you?

A. Not when I first saw her. She ran quite a while, and I kept on and on and on, on my course, before I saw that we were leading to trouble. Then I blew him a passing signal.

It is the rule established by the Alaska Steamship Company and adhered to by most other vessels for the southbound vessel to always blow a passing signal first. That is understood by all Alaska pilots. I waited for him, when he saw my lights, to blow the

(Testimony of George William Rose.)

passing signal first but when he didn't blow a whistle, then I blew one. But he never saw the Eastern Prince. He never saw her until just before he hit her.

Q. You only blew your whistle once, didn't you Captain?

A. Only once. Under the law, I couldn't blow any other whistle.

Q. During this entire time, you only gave one whistle signal?      A. Yes.

Q. Am I to understand that that was not because you changed your course, but because you were indicating how you were going to pass the Roustabout?

A. Well, when I saw both of his lights coming, it was up to me to look out for myself because I thought danger existed because he didn't answer me. Then, when he was within about two miles of me, I blew that passing signal, which he never answered. And then I know there was trouble,—in fact, I said to the Quartermaster, "That God-damed bastard is going to hit us surer than hell; what the hell is he trying to do?"

Q. Well, now, this all occurred, of course, just a very [137] short period before the collision that you are referring to now?

A. I can't hear you.

Q. I say what you are referring to now occurred just a very few seconds or minutes before the collision, isn't that right?

A. As to the whistle?

Mr. Henke: Well, strike that.

(Testimony of George William Rose.)

The Court: Isn't there an exception in Admiralty practice that when we are hearing from the Captain we don't have any ordinary common law?

Mr. Long: It frequently happens, your Honor.

The Witness: The attorney speaks too low.

The Court: What was your question?

Mr. Henke: I have abandoned the question, your Honor. I will approach the problem from another angle.

Q. (By Mr. Henke): Captain, as I understand, you first saw the green light on the Roustabout?

A. I did.

Q. And then, without altering your course, you saw a red light on the Roustabout, is that right?

A. I did.

Q. Then, did you alter your course when you saw the red [138] light?

A. I started to go to the right a little bit so as to shut out his red light again and only get his green light. As long as we had his green light, we were safe. Then, after I shut out his red light, in a minute or so he showed it again. Then I made a lot of profane remarks about what the hell he was trying to do,—crowding me over on my side of the channel; why didn't he go out on his own side of the channel.

Q. Captain, when you first saw this green light that you refer to of the Roustabout, you would have passed starboard to starboard, would you not, in which event the Roustabout would have been close

(Testimony of George William Rose.)

to the shore and you would have been away from the east shore?

A. And I would have been on the shore. I would change course at Campbell River Bluff—change course to my left, but I wanted to get by this approaching vessel before I attempted to cross in front of him. If we had both pursued it, another five minutes for me and I would have been on the beach and he would have been going astern of me.

Q. You would have been on the beach on the east shore?      A. The east shore, yes.

Q. Why would that be if you were both passing starboard to starboard, because then the Roustabout would have [139] been closest to the shore, would it not?      A. No.

Q. If you are going north and the Roustabout is coming south, and you pass starboard to starboard—      A. That would have been all right.

Q. The Roustabout would have been closest to the east shore, would it not?

A. He was close to the east shore as it was.

Mr. Morrow: May it please the Court, the answer to that is obvious. The Captain has testified that the green light was off his port bow—therefore, it was off to the left. Counsel has asked the witness several times if it wouldn't be true that the vessels would pass starboard to starboard. The Captain has testified no it wouldn't and has illustrated that the vessels were on an angle. I think that is very clear.

(Testimony of George William Rose.)

Mr. Henke: It may be clear to Counsel. It is not to me. I am sorry for being so stupid.

The Court: Just state your question again, please.

Q. (By Mr. Henke): In view of the statement of Counsel: Did you see the green light approaching from your port? [140] A. Could I?

Q. Where did you see the green light of the Roustabout approaching from? A. When?

Q. Where? A. Where?

Mr. Long: Ask him how it bore from his vessel and then he will know what you are talking about.

Mr. Henke: All right.

Q. (By Mr. Henke): How did the green light of the Roustabout bear from your vessel?

A. About three points off of our port bow.

Mr. Morrow: Ask him what he means by three points.

The Witness: Three points; that is 33 degrees.

Q. (By Mr. Henke): In view of the fact that we have this chart here, Captain, I wonder if you would mind marking on it the position of the Roustabout and the position of the Eastern Prince at this time, designating by an arrow the manner in which the vessels were moving. A. At what time?

Q. At the time you first saw the Roustabout and saw this bright green light that you refer to. [141]

A. When I first saw the Roustabout I should judge that she was somewhere about there (indicating).

Q. All right. Will you make an arrow showing



(Testimony of George William Rose.)

the manner in which the Roustabout was moving at that time?

A. She comes through Seymour Narrows off Cape Race and then went on a course down to Steep Island. Ships steer very badly here in that the tide race is very swift, full of eddies and swirls and overfalls. It is very hard to steer a ship—especially one coming southbound light; a loaded ship steers better. I think this is about the course of the Roustabout. (Witness draws on chart.)

We came up from Cape Mudge, here, on a course of 312, expecting to make the next change off this Campbell River Bluff. We were probably coming up here. (Witness draws on chart.)

When I say “him,”—

Q. Will you put an arrow on there to indicate the manner in which the vessels were moving?

A. (Witness draws on chart.)

Q. Does that arrow indicate approximately the position of the Roustabout when you first saw her?

A. Yes—there. (Witness draws on chart.)

Q. Will you put an “R” there to indicate the Roustabout?

A. The Eastern Prince was down about here. (Witness draws [142] on chart.)

Mr. Long: What are you putting there to represent the Eastern Prince?

The Witness: “E.W.” A pilot coming north would change at this point—

Q. (By Mr. Henke): When you say “change at this point,” you refer to what point?



(Testimony of George William Rose.)

A. Campbell River Bluff.

Now, Mister, if I kept going I would go right in shore here; do you see?

If he kept going, and made no change—if we both kept our course, why, he would go in shore here (Indicating) This is a narrow channel; you haven't got much room to fool around in it; do you see?

Mr. Morrow: I think the record should show that the Captain has gone over this chart without the advantage of parallel rules or dividers and that his drawings are only approximations.

Mr. Long: That is right.

The Court: The record may so show.

A. (Continuing) I can't understand why Larry Parks, when he changed her—

Mr. Long: Off Steep Island you are indicating.

A. (Continuing) Swinging to his left and showed me his red light. If he can explain that he is a dandy.

Mr. Henke: I will ask that the voluntary statement be stricken.

The Court: It may go out.

A. (Continuing) Of course, he may have thought he had the whole place to himself.

The Court: That statement may go out.

Mr. Henke: Would it be convenient for you to return tomorrow morning?

The Witness: It is all right with me.

The Court: We will be in recess until tomorrow morning at 10:00 o'clock.

(At 4:55 p.m., Wednesday, July 16th, 1947,  
proceeding recessed until 10:00 a.m., Thursday,  
July 17th, 1947.) [144]

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Seattle, Washington  
July 17th, 1947, 10:00 a.m.

(All parties present as before.)

The Court: Are you ready?

Mr. Long: We are ready to proceed, your  
Honor. With counsel and the Court's permission,  
I would like to put on Admiral Zeusler and then  
proceed.

Mr. Henke: No objection.

The Court: That is all right.

FREDERICK ZEUSLER,

called as a witness by and on behalf of Libelants,  
having been first duly sworn, was examined and  
testified as follows:

Direct Examination

By Mr. Long:

Q. Will you state your full name to the Court,  
please, Admiral?      A. Frederick Zeusler.

Q. Where do you live? [145]      A. Seattle.

Q. What is your present status, Admiral, in  
connection with the United States Coast Guard?

A. I am retired.

Q. With what rank?      A. Admiral.

Q. What generally was your service, Admiral,

(Testimony of Frederick Zeusler.)

in the Coast Guard while on active duty; you might just trace it for the Court, generally, please.

A. I had approximately thirty-nine years of active service starting from Academy days. I served all over the United States, spending approximately thirteen and one-half years in Alaska. I served during the Emergency a part of the time in Alaska under, first, Captain Parker and then Admiral Reeves and then Admiral Whiting.

I was then in command of the Floating Forces in the early days—Senior Coast Guard Officer for Coast Guard matters and on the staff of the respective COMAL Sections. By COMAL Section I mean the Commands of the Alaska Sector which was the name of the Command in the early days of the war.

Q. Were you in charge of those duties during the early part of 1942 and particularly during the month of May, 1942? [146]

A. Yes, sir. My testimony will cover approximately the first six months of 1942. I feel that is sufficient to cover this particular case.

Q. Yes, there is, Admiral, and I appreciate your confining your testimony to that period which is here material.

So that we may have it precisely in the record, just what was your rank and your duties, during the first six months of 1942?

A. I was a Captain of the Coast Guard, Senior Coast Guard Officer and in Command of Floating Units in the Sector.

Q. Which Sector?

(Testimony of Frederick Zeusler.)

A. The Sitka Sector, at that time reaching out as far as Dutch Harbor.

Q. In the Territory of Alaska?

A. Yes, sir. Later on we divided our area into a number of Sectors which subdivided the original sector.

Q. How far south of Sitka did your jurisdiction reach?      A. As far as Dickson Entrance.

Q. Also in the Territory of Alaska?

A. Yes, sir.

Q. Are you and were you during the period we are discussing acquainted with the vessel USS Roustabout?

A. Yes, sir. The USS Roustabout was used as a tanker and general service vessel between Seattle and bases in [147] Alaska. While in Alaska we used her for various duties, depending on the conditions that existed. In the early days it was absolutely necessary to make use of everything—every type of craft we could possibly get; fishing vessels, towboats, anything that was available, because our equipment in Alaska was extremely bad. We were limited to very few types of craft, so that when we got a vessel of any kind whatsoever we converted her as fast as we could and made her available for any type of duty that we needed. The Roustabout was used primarily in shuttle service between here and Alaska. But in Alaska, whenever it was necessary to transport equipment from one base to another—either north or south—we used her; when it was necessary to escort in Alaskan waters, if I

(Testimony of Frederick Zeusler.)

had vessels going across open waters, and she was available—I usually let her go as a sort of a motor ship.

Q. Was she armed at that time?

A. She was.

Q. And at that time, Captain Zeusler, in what status was she in the Navy?

A. She was a commissioned vessel, the same as any of the other vessels that we have, manned by commissioned officers and men. [148]

Q. During the period we are discussing and particularly May of 1942, what if any war bases were located in the city of Seattle, having to do with the United States Navy?

A. Pier 91, I think, was used; Manchester was used. Bremerton was used.

Q. What was the function, in so far as the Alaska Sector which you have described is concerned of the bases in Seattle and Puget Sound?

A. Those bases furnished the gasoline and ordnance equipment and materials that we needed for Alaska.

Q. At that time—it has been agreed, of course—that there was a state of war existing between the Empire of Japan and this country? A. Yes.

Q. Was there any war activity as such in your Sector during May, 1942?

A. In this answer I will confine my remarks to approximate dates. I don't think it is necessary to go into details.

Q. No; that is quite all right.

(Testimony of Frederick Zeusler.)

A. We had reports from planes, ships, patrol vessels, fishermen of submarine activities on the 22nd of January, the 7th of February, the 22nd of March, the 1st of April, the 12th of April, the 23rd of May, the [149] 7th of June, the 13th of June, the 7th of July and the 20th of July.

Q. What, if anything, did you do or was done under your orders or command in reference to that war activity; what did our Forces do?

A. I was in Command of the Floating Units and coordinated floating units with the aviation units from Sitka, Annette Island, Port Armstrong and Port Althorp.

I might say that we finally got our first submarine on July 9th. That submarine was sunk about thirty miles off the west coast of Prince William—I will have to check on that Island.

Q. What general locality?

A. Approximate latitude of 51 degrees, 21 minutes, 2 seconds; longitude, 134 degrees, 40 minutes, and 7 seconds west. Following the middle of June, the ..... was attacked by a submarine and she managed to escape but was pretty well peppered with shots.

In July the *Arcadia*, a merchant vessel, was sunk one hundred miles south of Kodiak. One of our fishermen—that we had inducted into the Service—picked up a crew. She was then in an auxiliary status.

Q. Admiral, what if any war bases in your Sector, in [150] the Territory of Alaska, were served



(Testimony of Frederick Zeusler.)

by the USS Roustabout during the month of May, 1942?

A. In direct service they were usually the bases at Ketchikan and Sitka.

Q. Were those war bases? A. Yes, sir.

Q. Active?

A. Active—extremely active. The other bases that were serviced were Port Althorp, which was a Navy auxiliary facility, Juneau, which was a section base, Port Armstrong, which was a Navy auxiliary facility. We had to send her out to Kodiak on a number of occasions, and she also visited Seward, both of which were also active sections.

Q. What was the nature of the cargo carried by the USS Roustabout between the naval stations or bases in Seattle and the bases which you have indicated in your Sector in Alaska?

A. As far as I remember—of course, I did not check generally speaking—northbound, usually ordnance material, bombs—

Mr. Henke: If your Honor please, I object to the witness answering this question. I don't think any proper foundation has been laid of his knowledge of what the Roustabout carried. [151]

The Court: Strike the answer, then.

Q. (By Mr. Long): Are you familiar with the activity of the Roustabout during May, 1942?

A. Yes.

Q. Are you acquainted with her cargo and what

(Testimony of Frederick Zeusler.)

she transported from Seattle bases to the war bases in the north?

A. The only time I checked on her was when she was carrying petroleum and bombs for the air base at Sitka and the air base at Annette Island.

Q. Was that during May, 1942?

A. That was; yes, sir.

Q. And you know that of your own personal knowledge?      A. I do, yes, sir.

Q. Was the Roustabout under your jurisdiction when she reached your Sector?      A. Yes, sir.

Q. Was she subject to your orders while in your sector?      A. She was.

Q. What was her duty during this period with respect to the carriage of any southbound cargo from the Sector back to Seattle?

A. On southbound cargo she usually picked up such materials as had to be sent south. I just remember empty drums, [152] cases—

Q. What kind of cases?

A. Broken—oh, some old ordnance material, Coast Guard tanks and occasionally personnel.

Q. By personnel you mean what type of personnel?      A. Enlisted personnel.

Q. Of the United States Navy or Coast Guard?

A. Both.

Q. During the period of May, 1942, I will ask you whether or not the Roustabout had a function to perform on her southbound trips in connection with the war effort?

(Testimony of Frederick Zeusler.)

A. Just the normal function of any naval vessel to be on the alert and be prepared for activity of any kind.

Q. Did she have a function to perform in the carriage of any cargo southbound during that period?

A. Well, she always carried cargo of some sort. I am really not in a position to tell what she carried in those days except what I have seen them put aboard as I have stated.

Q. During that period was the Roustabout engaged in other than United States Naval Service?

A. No, sir.

Q. Did she carry any commercial cargo either northbound or southbound during that period?

A. Not while in my territory. [153]

Q. Was she employed as a merchant vessel at any time during that period? A. No, sir.

Q. In connection with the bases which you have mentioned, Sitka, Port Althorp, and these other bases, what, if any activity in connection with the prosecution of the war was being conducted at those bases; I don't mean the detail but in general the nature of the war operations there?

A. From Port Althorp we operated patrol boats and two planes. Those patrol boats and planes were used at the entrance—were used to check on enemy activity at the entrance to that particular port. At Juneau we maintained section bases—section bases where we had approximately four patrol craft. At Sitka we had floating patrol craft

(Testimony of Frederick Zeusler.)

and planes. Those planes were used to scout off-shore for enemy submarines, especially with regard to convoys. At Port Armstrong we maintained patrol boats and some planes and they were used to scout off-shore and also to patrol the entrance, because those days we did not allow large, slow craft to go off shore. We made most of the vessels go inside because of the fact that we knew submarines were off the American coast or off the Alaska coast. In many cases those [154] vessels were usually formed into convoys and taken across in formation. From Ketchikan we operated patrol craft and two planes. Annette Island's planes and Ketchikan's planes were used for patrolling the Dixon Entrance Sector.

Q. What function did the Roustabout serve, Admiral, in connection with the operation of surface aircraft at these bases during May of '42?

A. The materials that she brought to us were used to service these craft.

Mr. Long: I have a chart which is a little larger, if your Honor please, to put on an easel but I have it on a table. I think it might be helpful to your Honor. Maybe we can adjourn over here to this table so we can see it.

May it be marked as Libelants' Exhibit.

(Chart, Cape Flattery to Dixon Entrance, marked Libelants' Exhibit 4 for identification.)

Q. (By Mr. Long): I will show you what has been marked as Libelants' Exhibit 4. Are you

(Testimony of Frederick Zeusler.)

familiar with the two charts which comprise this exhibit?       A. Yes, sir.

Q. Are they official Navy Hydrographic office charts? [155]

A. They are official charts posted by the Coast Geodetic Survey Service.

Q. They are CG&S?       A. Yes, sir.

Q. Will you indicate to the Court by drawing around the spot with a red circle the Naval Base at Sitka?

A. (Witness draws on chart.) That is also an Air Station.

Q. And the Naval Base at Port Althorp?

A. (Witness draws on chart.) That is here. We used that to form our convoys to cross the Sound and patrol off that area.

Q. And Port Armstrong?

A. Yes. (Witness draws on Chart.) That is in this general area here.

Q. That is all right; just make a round circle in the general area.

A. (Witness draws on chart.)

Q. And Juneau, which incidentally is the capital of Alaska, is it not?       A. Yes.

Q. Ketchikan?

A. (Witness draws on chart.)

Q. And Annette Island.

A. Annette Island which was a combined base for the Army and Navy. [156]

Q. Does this map also show Discovery Passage?

A. Yes. (Witness indicates.)

(Testimony of Frederick Zeusler.)

Q. May I just indicate that with a red arrow? I will put "DP" opposite it to indicate Discovery Passage. And that is in British Columbia waters, is it not?      A. Yes, sir.

Q. The Admiral has indicated an "X" with a circle around it on the upper portion of Exhibit 4, I will ask you what that indicates, Admiral?

A. That indicates the approximate position of the sinking of a Japanese submarine on July 9th.

Q. Can we write "Jap Sub" opposite that?

A. (Witness writes on chart.) The Commanding Officers, who were engaged in this operation, were given Legions of Merit by the Secretary of the Navy.

Mr. Long: I think that is all. I will offer that chart in evidence, if your Honor please.

The Court: Is there any objection?

Mr. Henke: No.

The Court: It may be received.

(Libelants' Exhibit 4 received in evidence.)

Q. (By Mr. Long): When you refer to the inside route; generally speaking, without drawing a line, will you just trace for the Court from Seattle what is regarded [157] as the inside route to Alaska?

Mr. Henke: I think he should mark it.

Mr. Long: Just take a blue pencil. It is understood that it is not a navigation chart.

A. (Witness draws a blue line on chart.) That is the general course we insisted upon vessels tak-



(Testimony of Frederick Zeusler.)

ing during the war because of the fact that we had insufficient units and because of the enemy off-shore.

Q. Do you mean in May, 1942? A. Yes.

Q. You have indicated by a blue line the route from Puget Sound to in the vicinity of Graham Island?

A. Yes, sir. We allowed some vessels, who had high speeds, to go off shore. But any merchant vessel of slow speed was usually routed by the inside passage. They usually checked off at Ketchikan and from there went up either around this Sector here, and up or around through Juneau and up.

Q. Around through Icy Straits?

A. Yes. I might state that during the war it was our intention to issue orders for a general blackout at all times but we found it was really more dangerous to keep the lights out in the Inside Passage than it was to let them go offshore. So except in a very few cases we kept all lights burning on the Inside [158] Passage.

I might mention an instance of the Columbia. In one case there we turned off the lights in the Inside Passage and the Columbia landed high and dry on a mud bank. We figured it was safer to go inside with lights burning than to go inside with lights out.

The Court: Is there any objection to the introduction of that exhibit?

Mr. Henke: No objection.

(Testimony of Frederick Zeusler.)

The Court: It will be admitted in evidence as Exhibit 4.

(Libelants' Exhibit 4 received in evidence.)

Q. (By Mr. Long): If a vessel is bound from Seattle to Sitka, we will say, which in peacetimes is the more direct and safe route from a navigational standpoint—inside or outside?

A. The safest would be the outside. But the practice has been for most craft engaged in the Alaska run to take the Inside Passage. But for men not versed in the navigation of the Inside Passage, many of them will go—all of them will go outside.

Q. During May of 1942, what can you tell the Court as to the essentiality of the Roustabout in the war operations in Alaska; was she useless or useful? [159]

Mr. Henke: I don't think that question calls for an answer. We will assume they wouldn't have used her unless she was useful.

Mr. Long: I want to bring out, your Honor, that this vessel was an integral part of the war operation and very essential. The Admiral knows that and I would like to have it in the record.

The Court: What is your objection to the question?

Mr. Henke: I think that the question answers itself—whether she was useful or not useful—then so was very vessel which plied between here and Alaska.

(Testimony of Frederick Zeusler.)

The Court: Don't you think this witness understands what is meant by the question?

Mr. Long: I think so. I don't want to lead him.

The Court: The objection will be overruled.

Mr. Henke: Exception.

A. She was definitely essential because of the fact that this was an extreme shortage of different types of craft. She served so many different purposes that we definitely needed her.

Mr. Long: I think that is all. Mr. Henke, you may examine. [159-A]

#### Cross-Examination

By Mr. Henke:

Q. Admiral, are you acquainted with the physical characteristics of the Roustabout?

A. I could not describe her, no, sir; I have never been aboard.

Q. Do you know her age?

A. I do not, sir.

Q. Do you know what type of work she was engaged in before she was taken over at the beginning of the war?

A. I understand carrying petroleum products.

Q. Do you know her speed?

A. Not very fast; I think around eight knots.

Q. Yes; I believe they testified it was around eight knots.

Do you know the speed of a Liberty—DC-2 Liberty?

(Testimony of Frederick Zeusler.)

A. Well, that varies depending on the type; I should say thirteen to fifteen.

Q. So a regular Liberty would be about twice as fast, so far as speed was concerned, as the Roustabout?  
A. That is right; approximately.

Q. Referring again to an ordinary Liberty, she would normally carry more armament than the Roustabout would carry, would she not? [160]

A. I would like to explain my answer in this way: At the beginning of the emergency we were definitely—we were in desperate need of armament. We had to make use of everything we could find, good and bad. I am positive that had we had more and better equipment the Roustabout would have gotten better equipment than she had.

Q. I think that is correct. If you could have gotten better than her, you would have obtained the best you could?  
A. That is right.

The Court: I don't understand the Admiral's statement there.

In the event you could have gotten better equipment, how would that have affected the Roustabout?

The Witness: We would have given her better equipment all around, better guns and better aerial protection equipment.

Q. Actually, the fact is, is it not, Admiral, that the ordinary merchantmen would carry better armament than the Roustabout?

A. Larger caliber.

(Testimony of Frederick Zeusler.)

Mr. Long: I think the Liberty that Counsel refers to was not built in May, 1942. If he refers to thereafter, I have no objection to the question.

Mr. Henke: Do you mean there were no Liberties in May, 1942?

Mr. Long: Very few, if any.

Mr. Henke: If Counsel wants to testify to that fact, I will be glad to examine him.

Mr. Long: No. If you just confine your questions, I will have no objection.

Q. (By Mr. Henke): So you would say that as far as the Roustabout is concerned, she was less well armed than an ordinary merchant vessel or DC2 as we know it?

A. With respect to caliber, yes, sir; she had smaller stern guns, yes.

Q. The Roustabout may therefore be said to be a very slow craft and she is not the type of craft that you would normally risk in any substantial operation?

A. That is true. But I want to amplify that statement by saying that the two vessels that sank the submarine were manned by two 3-inch 23's and two 6-pounders which were even smaller caliber than the Roustabout's. We were using, as I say, the equipment we had. Therefore, it is not fair for us to compare an efficiently armed vessel with the equipment that we were using at that particular time. [162]

Q. Yes. But, Admiral, you wouldn't attempt to

(Testimony of Frederick Zeusler.)

tell the Court that the Roustabout is the type of vessel that would be used for any naval operation as such; she was just a plain, very slow tanker?

A. The Roustabout was faster than one of the patrol boats that sank the submarine; and it had better armament than one of those.

Q. All right. Let's go back to that then, Admiral. What were these patrol boats that you refer to?

A. One was a 125 footer and one was a converted halibut craft.

Q. The 125 footer, was that designated as a patrol boat?

A. Designed for Coast Guard patrol duty.

Q. It was one of the Coast Guard patrol boats which was designed prior to the war?

A. That is correct.

Q. What was its speed?

A. About eleven knots, maximum.

Q. And it was designed for Coastal Patrol work, was it not?

A. Servicing lights and rendering assistance in the smaller inlets.

Q. Well, it wasn't a light ship, though?

A. No.

Q. And it wasn't a service vessel? [163]

A. Not for harbor, no.

Q. It was a servicing vessel?

A. That is right, and for the purpose of servicing unwatched lights.



(Testimony of Frederick Zeusler.)

Q. And the other vessel was a converted troller?

A. A converted halibuter approximately 80 feet long making approximately eight knots.

Q. And those vessels were designed and in fact being employed for coastal work at that time?

A. That is correct.

Q. Naturally, small vessels of that type would carry relatively small arms; they couldn't carry anything very heavy?

A. That is correct.

Q. The base at Sitka extended over what distance, did you say?

A. The base at Sitka was our major base. Our planes were serviced from Sitka.

Q. Was there ever any enemy attacks on Sitka?

A. No, sir.

Q. Were there any enemy attacks on Juneau?

A. Not during that time.

Q. Were there any enemy attacks at any time upon any of the points that you marked with the red pencil on the chart of Alaska? [164]

A. Submarines were sighted in Dixon Entrance within half a mile—or make it a mile—of Annette Island. Submarines were sighted off our observation posts off the west coast within a mile of the shore.

Q. Well, Japanese submarines were sighted off the coasts of Oregon, Washington, and California, as well, were they not?

A. Yes, sir; but the submarines sank ships up there, too.

(Testimony of Frederick Zeusler.)

Q. As a matter of fact, off the coast of Washington, vessels ran without lights, didn't they?

A. Yes, sir.

Q. And off the coast of Washington they required a so-called brownout so as to prevent the reflection of lights?

A. Yes, sir.

Q. One Japanese submarine went so far as to fire on a point in California, didn't it?

A. It fired on a point in British Columbia, too.

Q. Submarines have that particular characteristic. Did you ever have any submarines in the Inland Passage?

A. Dixon Entrance.

Q. That was the only point inside?

A. In the Inside Passage, yes, sir—at Dixon Entrance.

Q. So that it was typical of the entire Pacific Ocean that the submarines of both forces more or less roved [165] at will, did they not?

A. I don't know what you mean "at will."

Q. Well, our submarines were all over Japanese waters. Theirs, to the best of their ability, came over here and both sides patrolled against them?

A. I don't think I am in a position to answer that question because it involves certain technicalities that I cannot give you.

Q. All right. What would be the nearest enemy attack that was made on any place; it would be Dutch Harbor, wouldn't it, that there was any action? There was one air raid there, I believe.

(Testimony of Frederick Zeusler.)

A. Dutch Harbor—yes, sir; the nearest land attack.

Q. How far is Dutch Harbor from Sitka?

A. Approximately 1100 miles I should say.

Q. Approximately 1100 miles?

A. I should say that. I am confining my statements primarily to the first six months. I am not in a position to give any information beyond that so therefore my information is not exactly correct when it comes to the period beyond the end of July of that year.

Mr. Long: '42?

The Witness: '42, yes, sir. [166]

Q. (By Mr. Henke): You were transferred to other duty at that time, were you?

A. No, sir. I was transferred from Alaska in the middle of 1944.

Q. How far are the Islands which the Japanese occupied in the Aleutians from Sitka?

A. That I do not know. Attu is 900 miles from Dutch Harbor and Adak is approximately 780, something like that. But I don't know the exact distances.

Q. So that would be around—

A. Approximately 2,000 miles.

Q. Approximately 2,000 miles?

A. Yes, sir.

Q. That would be approximately the distance say from here to Chicago as an example, as the corresponding distance?

(Testimony of Frederick Zeusler.)

A. I don't know the distance from here to Chicago; so I am not in a position to answer that.

Q. I have to confine it to places across the ocean! Well, the Inland Passage, as I understand it, Admiral, is the Passage which is commonly used by most of the vessels operating in the Alaska trade, is it not?

A. That is the Alaska Steam, Alaska Transportation, Northland Transportation, and the Canadian ships; yes, sir. [167]

Mr. Henke: I think that is all.

#### Redirect Examination

By Mr. Long:

Q. Despite the fact that the Japanese hadn't landed with their land forces at Sitka in Southeastern Alaska, was any effort being made by the Navy and Coast Guard to guard against any such invasion and attack?

A. Yes, sir; and also the Canadian Forces.

Q. While land forces of the Japanese or the Army didn't land in Southeastern Alaska, was there activity of their surface craft—submarine or surface craft in Southeastern Alaska?

A. Yes, sir; quite pronounced.

Mr. Long: That is all.

#### Recross-Examination

By Mr. Henke:

Q. Were there any Japanese surface craft in Southeastern Alaska?

(Testimony of Frederick Zeusler.)

A. No, sir; just subsurface craft.

Q. Just submarine activity? A. Yes, sir.

Q. And so far as protecting Alaska was concerned, the Navy was sparing no effort to protect all of the rest of the [168] Pacific Coast as well, was it not, against any kind of attack?

A. The largest surface craft were never stationed in Southeastern; they were always stationed to the westward.

Mr. Henke: I believe that is all. Thank you, Admiral.

Mr. Long: Thank you, Admiral, very kindly.

(Witness excused.)

Mr. Long: I believe you were examining the Captain.

## CAPTAIN GEORGE WILLIAM ROSE

(Resumed)

Cross-Examination—(Continuing)

By Mr. Henke:

Q. Captain, do you know how old the Eastern Prince was?

A. Well, I did know but I have forgotten the date she was built in Boston.

Q. You say she was built in Boston?

A. Yes.

Q. Was she built since 1900; was she built after 1900?

A. Well, I wouldn't state that positively. But she was [169] not a very old vessel. I think she was within the 20-year limit. When they made the

(Testimony of Captain George William Rose.)

repairs in Vancouver, she didn't show any age--no deterioration to speak of.

Q. Captain, referring now to the accident itself, how far away was the Roustabout when you first sighted it—when you first saw it?

A. When I first sighted the Roustabout, between three and five miles.

Q. As I recall your statement yesterday, you anticipated that it would turn at a particular point in coming down the channel, is that right?

A. Repeat it, please?

Mr. Henke: Will you read the question, Mr. Reporter?

(Last question repeated by the reporter.)

A. That is true.

Q. (By Mr. Henke): What was that point?

A. Steep Island.

Q. What did you anticipate that the Roustabout would do at that point?

A. That she would go to her own right.

A. That would be your impression of the normal procedure in coming down that channel?

A. It would. [170]

Q. Would she give any signal at that time?

A. No, sir.

Q. Normally, in following the channel in either direction, vessels do not give signals there, do they?

A. I didn't get that.

Mr. Long: I object to that unless it is indicated whether it is another vessel in sight of each other.



(Testimony of Captain George William Rose.)

Signals are not required unless vessels are in sight of each other.

The Court: Does your question contemplate——

Mr. Long: Whether vessels are in sight of each other.

Mr. Henke: I just asked the general question of whether it is customary to give signals.

The Court: The objection will be sustained. I can't see any sense in giving signals if there is no other ship in sight.

A. He wouldn't give any signal unless he had seen me; and he admitted that he didn't see me.

Q. (By Mr. Henke): When you first sighted the Roustabout, where was it in relation to your vessel?

A. Well, he was three miles or more away northward in the channel. I was going north and he was coming [171] south. I was bucking a flood tide; he was coming with the flood tide. He was coming very rapidly. I was moving over the ground very slowly. We were both on the right-hand side of the channel. When I saw him, I expected that he would go to his right, which he did not do.

Q. What direction was his vessel moving in relation to yours?

A. Well, I should say he was about three or four points off my bow, coming toward me.

Mr. Long: Which bow, port or starboard?

The Witness: Port—the left-hand side of the ship.

(Testimony of Captain George William Rose.)

Q. (By Mr. Henke): You took what action then; what did you do then?

A. Then I proceeded on my course, and when I saw that his lights had changed their range and if he continued on that course that he would jeopardize me, I turned to the right.

Q. You turned to the right. What did you do after you turned to the right?

A. I opened up his port light, shut out his green light, I steadied my ship and proceeded north on my course of 312 degrees. [172]

Q. I believe you gave a whistle signal at that time?     A. No.

Q. No.

A. Then his green light came into view again which meant danger for me. Then I told my Quartermaster, "Put the wheel hard a'port," and at the same time I reached up and blew one blast of the whistle.

Q. How far away was he at that time?

A. Oh, I judge a mile and a half or a mile—between a mile and a mile and a half.

Mr. Henke: That is all.

#### Redirect Examination

By Mr. Long:

Q. Captain, I just want to clear up one thing, which we so frequently have with you men who went to sea fifty years ago. You mentioned a while ago that you told your helmsman "Hard a'port" in order to direct the ship's head to the right?

(Testimony of Captain George William Rose.)

A. Did I say "hard a'port?"

Q. That is what you said; that is what you said fifty years ago?      A. I meant hard right.

Q. Hard a'port is an old order?

A. That is out of date. [173]

Q. When you said "hard a'port" did you mean hard right?      A. Hard right.

Mr. Long: All right. That is all, Captain.

Mr. Henke: That is all.

The Court: You may be excused, Captain.

(Witness excused.)

Mr. Long: That is our testimony, your Honor, with the exception of the stipulation as to damages. I think we might agree upon that if your Honor would give us about a 5-minute recess.      ..

The Court: We will take a short recess. That is the stipulation which was mentioned at the outset, is it not?

Mr. Long: That is right. It will save all of the detail of proving each thing.

The Court: All right.

Court will be in recess.

(Short recess.)

Mr. Long: May it please the Court, the parties and their counsel have agreed upon the former stipulation as to the items of loss under the policy, assuming the policy covers, and we shall reduce that to writing during the noon hour and file it directly [174] after lunch as evidence in the case.

Reserving the right to file our stipulation as to the amount of the loss, **Libelants rest.**

The Court: You close your case with that exception?

Mr. Long: With that exception, your Honor.

The Court: You may now begin the presentation of your case.

Mr. Menke: Will you take the stand, please.

MARVIN S. BEASLEY

called as a witness by and on behalf of the Respondent, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Henke:

Q. What is your occupation, Mr. Beasley?

A. Chief Boatswain's Mate, United States Navy.

Q. You reside where?

A. Bremerton, Washington.

Q. In May, 1942, what occupation were you engaged in?

A. I was a seaman aboard the USS Roustabout.

Q. That is the vessel which has been referred to in these proceedings, is that right? [175]

A. Yes, sir.

Q. Were you aboard that vessel at the time of her collision with the Eastern Prince?

A. I was.

Q. How long did you serve aboard the Roustabout?

(Testimony of Marvin S. Beasley.)

A Approximately four years and three months.

Q During that period she was operating from Seattle to Sitka and various points in Alaska?

A Yes, sir.

Q What type of vessel was the Roustabout?

A The Navy classification was "Yard Oiler."

Mr. Long: "YO"?

The Witness: "YO"; yes, sir.

Q. (By Mr. Henke): What classification is that; what type of vessel is that supposed to be?

A. Strictly a district craft, operating in the 13th Naval District.

Q. That is as opposed to a tanker which would be used for off-shore work or going with the fleet or something of that kind?

Mr. Long: I think the witness should give the testimony.

Mr. Henke: I will reframe that.

Q. (By Mr. Henke): Will you distinguish it from other [176] vessels?

A. That vessel is for small tankers operating in off-shore activities to and from shore bases in distinction from fleet classifications such as "AO" or other designations which the Navy has.

Q. What was the character of the cargo which the Roustabout normally carried on her voyages?

A. Primarily fuel oil, Diesel oil, aviation gasoline, ordnance material, and general cargo.

Q. What facilities did she have for carrying general cargo?

(Testimony of Marvin S. Beasley.)

A. She was equipped with cargo booms to handle general cargo and a 2-deck hold.

Q. Why type of dry cargo did you normally carry on your voyages northbound?

A. General cargo; that is all I can state, including everything.

Q. Furniture?                      A. Furniture.

Q. Food products?

A. Automobiles, food products, ship's service material, clothing, anything should would take aboard.

Q. Southbound, of course, you returned light, did you not?                      A. Yes, sir.

Q. What type of cargo did you bring back with you in the [177] way of dry cargo?

A. Material that needed repair or any material the Navy deemed salvagable.

Q. Referring to the date upon which the collision occurred between the Roustabout and the Eastern Prince, what duty were you performing aboard the vessel at that time?

A. I was on watch as the bow lookout.

Q. As bow lookout, did you observe any other vessels in the channel ahead of the Roustabout?

A. Yes, sir.

Q. What were the nature of those vessels?

A. Fishing vessels and numerous small craft.

Q. Were there very many of those craft?

A. Yes, sir; very many.

Q. Did you observe the Eastern Prince as it was



(Testimony of Marvin S. Beasley.)

approached by the Roustabout? A. Yes, sir.

Q. Could you state the nature of the lights which you observed upon the Eastern Prince at that time?

A. Only white lights were visible until the ship was too close for safe navigation.

Mr. Long: I move that the latter portion of the answer be stricken, your Honor. The question was "What lights did he observe?" [178]

The Court: The latter part may go out.

Q. (By Mr. Henke): From your observation of the Eastern Prince, as you approached her, what conclusion had you reached as to whether she was going north or south?

A. Well, that I can't answer. I assumed she was going in the same direction we were, which was southbound.

Q. While you were observing the vessel at these times, could you see the red and green lights upon the vessel? A. Will you state that again?

Q. I say when you were observing the vessel as you approached it prior to the time that you realized there was any peril involved, were you able to observe the red and green lights upon the Eastern Prince? A. No, sir.

Q. All that you could see was white lights?

A. Yes, sir.

Q. When did you observe any of the red or green lights of the Eastern Prince?

(Testimony of Marvin S. Beasley.)

A. I can't answer that with any degree of accuracy.

Q. Did you pick up her running lights before they picked them up on the bridge, or would you say they were conscious of it on the bridge before you were?

Mr. Long: Just a moment. I have to object to that. I don't see how this witness out on the bow of the ship at night knows what was going on in somebody's mind on the bridge. I think that is too speculative. He can say what he did or what he saw.

Mr. Henke: Strike that question.

Q. (By Mr. Henke): What did you do when you observed the navigating lights, the running lights of the Eastern Prince?

A. Well, in the capacity of bow lookout I knew the Captain was fully aware.

The Court: I couldn't quite hear you.

A. (Continuing): In the capacity of bow lookout, I knew the skipper was fully aware of the danger. My capacity did not involve giving any orders, so I was at a loss to take any action whatever.

Q. As bow lookout, you would have notified the bridge if you had observed the vessel was in peril, would you not?

A. That is correct.

Q. What are the duties of the bow lookout?

A. To watch for dangers to the ship such as

(Testimony of Marvin S. Beasley.)

floating logs and to warn the commanding officer of any danger.

Q. Let me ask you this question: What was the relation [180] of the two vessels when you first became conscious of the fact that the Eastern Prince was going in the opposite direction from the Roustabout?

A. Well, we were coming on a collision course.

Q. When you became conscious of that fact, had there been any change in the course of your own vessel?

Mr. Long: I object to that unless the witness indicates that he knows. I submit the lookout on the bow wouldn't know anything about the vessel's course. I object to it unless he shows qualification to know what the vessel's course was and what changes were made.

The Court: The objection is sustained. See if you can lay a foundation.

Will you read the question?

(Last question repeated by the reporter.)

The Court: Aren't you assuming a fact not in evidence?

Mr. Henke: I am just asking him if he was conscious of a change in the course of his own vessel.

The Court: Read the question again, Mr. Reporter.

(Last question repeated by the reporter.)

The Court: The ruling will be vacated. The

(Testimony of Marvin S. Beasley.)

objection is overruled. You may answer the question.      A. That I do not know.

Q. (By Mr. Henke): Was there any change in the course subsequent thereto?      A. Yes, sir.

Q. What was the nature of that action?

A. My recollection is the ship Roustabout turned hard to port.

Mr. Long: To the left—to her left?

The Witness: To the left; yes, sir.

Q. (By Mr. Henke): What interval of time would you say there was between that action on the part of the Roustabout and her own becoming conscious that the Eastern Prince was moving in a direction opposite to the Roustabout?

A. That I can't say.

Q. Would it be a matter of minutes or seconds?

Mr. Long: I think the witness says he can't say.

Q. (By Mr. Henke): Mr. Beasley, will you tell me the position [182] of the Roustabout as to her height out of the water at the time of the accident?

A. The ship was on light draft, unloaded, with water in two tanks for ballast, I believe. Her bridge was approximately thirty feet above the water. My position was approximately twenty feet above the water.

Q. What would be your position in respect to the Eastern Prince; would she be on the level with you or would you be looking down at her?

A. We would be looking down at her.

Q. As you observed her, as you approached,

(Testimony of Marvin S. Beasley.)

could you say how many lights you saw upon her or give some estimate as to that?

A. I would say there were at least half a dozen white deck lights burning on the Eastern Prince.

Q. As I understand it, you saw no other lights?

A. No, sir.

Mr. Henke: You may take the witness.

### Cross-Examination

By Mr. Long:

Q. Mr. Beasley, as I understand, you are presently a Boatswain's Mate, is that right?

A. Yes, sir. [183]

Q. In what department or service of Bremer-  
ton? A. The Administrative Department.

Q. What are your duties now?

A. Acting as Yard Operations Officer.

Q. Yard Operations Officer? A. Yes.

Q. Keeping the records and that sort of thing?

A. Keeping the movements of the Navy Yard under operational control.

Q. When did you join the Navy, sir; prior or during the war? A. November of 1940.

Q. What was your work prior to that?

A. I was a college student.

Q. When did you join the Roustabout as a member of her crew? A. In June of 1941.

Q. You were a regular enlisted man, were you not? A. Yes, sir.

Q. And the Roustabout's Commander and Offi-

(Testimony of Marvin S. Beasley.)

cers were Officers in the United States Navy?

A. Yes, sir.

Q. And her crew was composed of enlisted personnel of the Navy?      A. Yes, sir. [184]

Q. She was a duly commissioned vessel of the United States Navy in May of 1942, was she not?

A. Yes, sir.

Q. And during that period she was engaged in a shuttle run between bases here in Seattle—Naval Bases—and bases in Alaska?      A. Yes, sir.

Q. Carrying petroleum products to those bases in Alaska northbound and carrying back whatever was to be carried back, as you have mentioned, southbound?      A. Yes, sir.

Q. And her southbound trips included, as I have noted here, material for repair. Would that be Navy material such as damaged planes and other equipment of the Navy?

A. Navy and Coast Guard, both.

Q. Navy and Coast Guard?      A. Yes, sir.

Q. I noticed, also, you indicated on her northbound voyage, in addition to the petroleum products, she carried ordnance material. What do you mean by ordnance material?

A. We carried small arms ammunition; also anti-aircraft ammunition. At various times we did handle dynamite for construction work by the CB's.

Q. That is a branch of the Navy?

A. Yes, sir; and also some torpedoes.

Q. For use in submarines?



(Testimony of Marvin S. Beasley.)

A. I assume they were, either submarines or aircraft torpedoes; not being familiar, I wouldn't say.

Q. You also carried some aerial bombs in your dry cargo hold, northbound? A. Yes, sir.

Q. You also mentioned on your southbound trips you carried salvageable material for the Navy? Just what do you mean by that?

A. We brought back air bottles, oxygen tanks, for the Coast Guard activities. We brought back planes that had minor damage.

Q. What kind of planes?

A. Observation planes.

Q. Navy, Coast Guard? A. Navy.

Q. Navy.

A. And the rest of the cargo was comprised usually of excess materials that we had taken north and they were unable to use.

Q. Did you bring back some defective ammunition from time to time? A. Yes, sir. [186]

Q. The cargo of petroleum products and ordnance materials you picked up where at Seattle—at Pier 91 or other stations here in Seattle?

A. In this area, yes, sir.

Q. And you delivered them to Sitka and other bases in Alaska? A. Yes, sir.

Q. Were those active Naval Bases at that time in May of '42? A. Yes, sir.

Q. Were there patrols being made by air and

(Testimony of Marvin S. Beasley.)

surface craft out of those bases at that time searching for enemy submarines and aircraft?

A. To my knowledge, yes.

Q. And the petroleum products, including aviation gas, that you carried on the Roustabout north-bound, were used in those planes and vessels, were they not?      A. Yes, sir.

Q. As I understand your testimony, Mr. Beasley, you were the lookout on the bow of the Roustabout on the evening or early morning at the time of this collision, is that correct, sir?

A. That is correct.

Q. What means of communication did you have from your lookout station on the bow to the bridge?

A. Voice communication.

Q. Voice communication?      A. Yes, sir.

Q. Did you have a bell to ring?

A. Not under those circumstances; no, sir.

Q. Well, did you have a signal bell up there to signal the bridge?

A. We have an anchor bell that was used when we anchored in fog.

Q. Don't you know as lookout the proper bells to strike when you see an object over your port or starboard bow or dead ahead, to notify the bridge?

A. No, sir; at this time I do not. I have forgotten.

Q. When you saw the red light of the Eastern Prince—and you did see it prior to the collision,

(Testimony of Marvin S. Beasley.)

didn't you? A. Yes, sir.

Q. You took no action whatsoever; I wrote down your answer. Is that correct?

A. That is right.

Q. Then you say the course of the Roustabout was changed to port or to her left?

A. As I remember it, yes, sir.

Q. Was the Eastern Prince at the same time swinging to her—the Eastern Prince's—right?

A. Yes, sir. [188]

Q. So the course of the Roustabout was directed in an obvious collision position with the Eastern Prince; she was swinging to the right and you were swinging to the left, isn't that correct?

A. Well, that would be for the Commanding Officer of the ship to state.

Q. Well, did you see it? They came together, didn't they?

A. They came together, yes, sir.

Q. As lookout, you don't have anything to do with the actual navigation of the ship—the direction of her head or helm, do you, sir?

A. No, sir.

Mr. Long: I think that is all. Thank you.

#### Redirect Examination

By Mr. Henke:

Q. I believe you stated that you served on board the Roustabout for what period of time?

A. Over four years, sir.

Q. During that time, did you ever see any

(Testimony of Marvin S. Beasley.)

enemy naval vessels of any kind?            A. No, sir.

Q. Did you ever see any enemy aircraft? [189]

A. No, sir.

Mr. Henke: That is all.

Recross-Examination

By Mr. Long:

Q. You had armament aboard the Roustabout, did you not, sir, in the form of guns?

A. Yes, sir.

Q. If you had sighted enemy submarines or aircraft, would you have used them?

A. Yes, sir.

Q. That is what they were there for, wasn't it?

A. Yes, sir.

Mr. Long: That is all.

Mr. Henke: That is all. Thank you.

The Court: May this witness be excused now?

Mr. Long: Yes, your Honor.

Mr. Henke: Yes.

The Court: You may be excused.

(Witness excused.)

Mr. Henke: I do not believe that we will offer any further testimony, your Honor. [190]

The Court: We will be in recess until 2:00 o'clock.

Mr. Long: All we will have then is the filing of the stipulation.

I presume your Honor will wish at least a brief argument on this subject.

The Court: Yes, I would like to hear your argument.

Mr. Henke: We would desire from the nature of this case—it is rather complicated—the privilege of submitting a written brief to your Honor.

I was just wondering if we could submit *it* written briefs rather than burden the Court with further argument.

Mr. Long: That of course is a matter as to the Court's desires in the matter. I thought we might be a little helpful to the Court on the question of navigation, here. I think the strictly war risk question is well outlined and carefully prepared in the briefs, but I thought that a brief resume might be helpful to the Court—whatever the Court wishes in that regard. I think probably our arguments of five minutes to a side might be helpful.

The Court: I would like to hear your arguments. [191]

Mr. Henke: Very good.

The Court: Court is recessed then until 2:00 o'clock.

(At 11:45 a.m., Thursday, July 17, 1947, proceedings recessed until 2:00 p.m., on the same day in the United States Court House.)

Seattle, Washington

July 17th, 1947, 2:00 p.m.

(All parties present as before.)

The Court: What is the situation now in regard to this case?

Mr. Long: I stated before lunch, your Honor,

that we would reach a written stipulation concerning the facts as to the Libelants' loss claimed to be due under the policy. We did reach that stipulation which I would like to file and make a part of the evidence in the case.

Attached to the original Libel, your Honor, is what is known as a Statement of General and Particular Average. It is a bound document which is incorporated in this stipulation and which it is admitted may be admitted in evidence as Libelants' Exhibit Number 5.

I would like permission to detach it from the original Libel and file it as an exhibit.

(State of General and Particular Average re SS Eastern Prince marked Libelants' Exhibit 5 for identification.) [193]

Mr. Long: In accordance with the written stipulation referred to, I should like to offer in evidence Libelants' Exhibit Number 5, being the Statement of General and Particular Average in the case of the Eastern Prince referred to in this stipulation.

The Court: It may be admitted in evidence.

You have no objection?

Mr. Henke: No; subject to the statements contained in the stipulation filed with the Court.

(Libelants' Exhibit 5 received in evidence.)

Mr. Long: Libelants' Exhibit 5, now in evidence, is the document referred to in the Libel and Amended Libel as Exhibit "B" to the Libel and Amended Libel. They are the same documents.

The allegation of paragraph 5 of the Amended Libel reads as follows:



“That there is due and owing to Libelants from Respondent on said policy of insurance the sum of \$11,031.29, all as more fully appears on said Exhibit ‘B’—which is now Exhibit ‘5’—and although demand accompanies by the submission of said Exhibit ‘B’ was heretofore made on respondent [194] for payment on the 11th day of September, 1942, respondent has refused to pay the same.”

The answer to that Article of the Amended Libel made by respondents is as follows:

“Answering paragraph V of said Amended Libel, the respondent denies the same and each and every part thereof except that respondent admits that demand was made for payment as therein recited and that said payment was refused by respondent, and particularly denies that the respondent is indebted to the libelants or any of them in the sum of \$11,031.29 or in any sum whatsoever.”

I wanted to make those recitations for the record so that we could tie it with this exhibit.

With the filing of that stipulation and the exhibit, your Honor, the libelant now formally rests.

The Court: Do you have any further testimony?

Mr. Henke: No, we have no further testimony to offer to your Honor.

In respect to the argument of the case, as I understand we present oral argument, but we would [195] desire the privilege of submitting a written brief to your Honor, in view of the complications

of the questions submitted. I would like to have that privilege.

Mr. Long: I was going to suggest, your Honor, that we have this record written up and transcribed for the Court's use if so desired. We would be perfectly willing to stand half of the cost for so doing.

The Court: Counsel would desire to submit authorities?

Mr. Henke: Yes; we would desire to submit a brief if we may, your Honor.

The Court: How much time would you like to have?

Mr. Henke: Did you desire to submit a brief?

Mr. Long: I think the matter has been quite thoroughly covered by rather voluminous briefs now on file. If you wish to submit a brief, of course, we would have no objection whatever. We would like to have an opportunity to respond to it is all.

The Court: Is your intention based upon the mistaken premises of Judge Bowen here as to the direction the ships were going?

Mr. Henke: Judge Bowen's opinion was merely [196] passing upon the general allegation of their libel as we view it. In view of the introduction of the testimony in the case, we believe the matter should again be reviewed and we would desire again to submit the detailed law upon this subject of war risk insurance; particularly as it applies in this particular case.

Mr. Long: Responding directly to your Honor's question, we don't regard it as being material which direction the ship was going in this shuttle service. I think the cases will bear us out in that contention.

Mr. Henke: I probably didn't answer your Honor correctly, there. Counsel, of course, has used this term "shuttle service" which was introduced by their witnesses, which is a term used in the settlement agreement, which is referred to in our brief and of which we will furnish your Honor with a copy.

I think that that is a factor; the fact that the vessel was returning to Seattle light is a factor to be considered in the light of these cases, unquestionably.

The Court: Other than that, if Judge Bowen's opinion is the law of the case, I am not disposed to go behind it. [197]

Mr. Henke: We would not desire to be left in that position if we could avoid it. That is, we desire to submit the whole question so that it might be fully reviewed.

The Court: At the outset, it was stated, I believe, by Mr. Long and I got the idea that you agreed, that the contentions here were, first, whether or not the Steamship Roustabout was engaged in warlike operations. Isn't that the contention?

Mr. Henke: That is one of the questions, yes.

The Court: That is one of the questions. And then, if so, did this collision result from fault in any degree on the part of the Roustabout?

Mr. Long: That is correct, your Honor.

The Court: So that if the collision resulted from some degree of fault on the part of the Roustabout, and the Roustabout was engaged in warlike operations, the determination of those two questions determines the case?

Mr. Long: That is correct, your Honor.

Mr. Henke: I believe that is correct, your Honor.

The Court: Unless there is some contention made or some authorities to be submitted that the Roustabout turned around and was going the other way, [198] as thought by Judge Bowen, would make any difference in the case, I am ready to make finding.

Mr. Henke: If your Honor please, I think there is no question about that. That is one reason I wanted the privilege of submitting these authorities in detail to your Honor. The question is a very complicated one.

The Court: If the ship Roustabout was engaged about this time—the term is stated here, “In warlike operations,”—and it was a warlike operation making a trip from Seattle, loaded with the different kinds of petroleum or classes of oil and gasoline, and then on the way back came back in ballast, even if she didn’t have anything on board coming back, if she came back here with the purpose of resuming and taking on another cargo here, it seems to me it would be just as much a warlike operation in one direction as the other.

Mr. Long: That is it.

Mr. Henke: In the first place, I don’t think

that the vessel should be considered as being in war-like operation or one which brings it within war-risk. That is the reason I would like to have the privilege of submitting a brief upon the subject so that we may make our position clear. [199]

Mr. Long: I think we might devote ourselves in our oral argument to just that point, your Honor, that your Honor has in mind—the question of war risk rather than touching on the navigation aspects of it.

The Court: On the question of war risk, I have read Judge Bowen's decision. It seems to me that if there is any meaning to this phrase that we have heard so many times, "the law of this case," this certainly would be the law of this case unless the mere fact that we had the vessels turned around would make any difference and I can't see where it would make a difference. So I think that is the law of this case—Judge Bowen's decision is the law of this case. I am not inclined to consider going in behind it.

Unless you have something to offer that would destroy the force of his opinion by virtue of the mere fact that he considered the ship's going from Seattle to the Alaskan bases rather than from Alaska to Seattle, I am going to make findings now.

Mr. Henke: I would request the privilege, your Honor of submitting a brief. I cannot, of course, go beyond that.

The Court: I really don't see any need of it, [200] as far as I am concerned. So unless you



want to address your argument to this one point, I am ready to make some finding.

Mr. Henke: Do I understand that your Honor, then, that you do not wish to have even an oral argument?

The Court: Unless you want to argue on this one point. There is no use in arguing—you are wasting your time to argue any questions of law that would be contrary to the views expressed by Judge Bowen. I am going to accept his ruling as the law of the case. Only in the event that we had the ships going the other way would make some difference in the law; and I don't see how it could.

However, I am not going to restrict you from oral argument on any point. But I will be hard to convince on any point contrary to Judge Bowen's decision. I will put it that way. But if you want to argue on any other point, you may do so.

Mr. Henke: If your Honor please, you will recall that Judge Bowen's decision was not passing upon the facts of the case but was passing upon the allegations of the libel, itself. That portion of the libel which Judge Bowen was passing upon—

The Court: Well, isn't that set forth in [201] paragraph 1 on lines 24 to 30, page 1, and then on page 6, from line 7? I had in mind findings along these lines: That at the time involved here the Roustabout was officered, manned, and operated by the United States Navy and was proceeding between Alaska war bases and Seattle, either with a cargo such as was mentioned as the usual cargo carried from Alaska bases to Seattle or without cargo com-



ing to Seattle for the purpose of taking on a cargo of fuel oil, gasoline and other petroleum products for use by naval vessels and aircraft of the United States in the prosecution of the war with Japan. I have in mind making such findings as a result of my views of the evidence that I have heard here. I get the point you just made here.

The findings Judge Bowen has assumed, as shown by the Libel, except as to the direction the ship was heading, would be found as facts by me at this time.

Mr. Henke: Do I assume also that you would make findings that the Roustabout was at fault?

The Court: Partly at fault.

Mr. Long: Your Honor, there was a finding of mutual fault of both vessels?

The Court: Mutual fault. [202]

Mr. Henke: If your Honor please, the reason that I asked for the privilege of submitting the brief was that I was fearful that your Honor would just on a casual reading of Judge Bowen's opinion, and considering the evidence, probably come to the point that you have. It seems to me that only by a consideration of these authorities in detail can you come to an appreciation of the question of war risk.

Circumstances of the present case—of course, the mere fact that the Roustabout was operated by the Navy is no justification for concluding that she was a warship and subject to making this a war-like operation. When Judge Bowen made his decision, of course, he was giving the libelant the

benefit of the doubt and taking the circumstances as recited in the libel that this vessel was engaged—

The Court: I won't shut you out from compiling a brief if you want to; and if you can cite some authorities or by argument convince me that the statements that I have made here are incorrect, I will backtrack very readily.

Mr. Henke: I would like to have that privilege.

The Court: You may. [203]

Mr. Henke: I wonder if we might have two weeks within which to submit that, if that is agreeable to Counsel?

Mr. Morrow: May it please the Court, at this time we would like to make a very short oral argument upon the point requested by the Court.

Mr. Long: We have no objection to the submission of a brief, your Honor, at all, if we have the privilege of responding to it.

The Court: Twenty and ten, is that all right?

Mr. Long: That is very good.

Mr. Henke: Yes, sir.

The Court: All right.

Mr. Long: Thank you.

(Whereupon Argument was delivered by Counsel for the respective parties.)

(At 4:10 p.m., Thursday, July 17th, 1947, the taking of evidence having been concluded, the case was taken under advisement by the Court.)

(Concluded.) [204]

## CERTIFICATE

I, Merritt G. Dyer, Official Reporter, United States District Court, hereby certify that I reported all of the proceedings in the foregoing case and that the transcript thereof is a full true, and correct statement of the proceedings occurring therein.

/s/ MERRITT G. DYER,  
Official Court Reporter.

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[Title of District Court and Cause.]

## TRANSCRIPT OF PROCEEDINGS AT TRIAL

Seattle, Washington

July 16-17, 1947

## FINAL ORAL ARGUMENTS

Mr. Morrow: May it please the Court, the basis of Judge Bowen's decision, namely, that the USS Roustabout was a war vessel engaged in naval service, having aboard her United States Navy officers and personnel, and coming into collision with another vessel by reason of fault of the USS Roustabout, would appear to be conclusive of the law of the subject.

The probable contention of the respondent that the direction in which the Roustabout was going at the time, namely, from Alaskan war bases to war bases in the United States makes a difference—

The Court: Pardon me, before we forget it. The thought that you had of having the transcript made is still in effect, is it, in view of the—

Mr. Long: I am quite willing to do so, yes, your Honor.

Mr. Henke: Yes, your Honor.

Mr. Long: We will share the expense of it.

The Court: All right. The arguments of counsel and the transcript of the testimony?

Mr. Long: Yes, your Honor.

Mr. Henke: Yes.

Mr. Morrow: I direct the Court's attention to the extensive brief, the original brief filed by [205] libelants on page 10 thereof, referring to the *Worilda*, entitled the *Adelide Steamship Company, Ltd.*, vs. *The Crown*, 14 *Lloyds Law Reports*, page 549. In that case the *Worilda* was a vessel requisitioned by the British Government and used as an Army hospital ship. She was on her way—return I should say—from forward war bases at Havre, France to Southampton, England, when the collision occurred. She had aboard her, at the time—being a hospital ship—wounded men, doctors, nurses. She collided with another ship, a merchant vessel, which was carrying general cargo. The *Worilda*—the quasi war ship, we will call it—was at fault and the Court held therein that the damage to the *Worilda* was a consequence of the warlike operation as was the damage to the other vessel. That is a case of the vessel returning. The other cases, one is a companion case—that is, two cases set forth in one report—involve the *Tartar* which was a destroyer on submarine duty, when in collision with another vessel at the turn of her beat of patrol—momentarily as it were not doing patrol

duty—but on the turn of her beat she came into collision with another vessel. The damage to the other vessel was held to be a consequence of a warlike operation. [206]

Those cases are likewise reported in our brief and are referred to in Judge Bowen's decision—referred to therein as the *Tartar*.

The companion case in that report, which isn't mentioned by Judge Bowen, is much of the same nature. It refers to His Majesty's Ship, the *Devonshire* which was going to convoy duty. She was not at the time strictly engaged in what you might say enemy activity, but she was engaged in her duty as a war vessel. And where collision occurred they held that it was a consequence of a warlike operation.

The most significant case, perhaps, and the main basis upon which Judge Bowen made his decision, was the *Travonian-Roanoak*, referred to by citation as the *Board of Trade vs. Haines Steamship Company*. That case involved a United States Naval Mine layer. She was returning to the United States after the Armistice was signed, after hostilities had ceased anyway. And while in, you might say, American waters came into contact—collision with an American vessel. The damage to the other vessel was held a consequence of the warlike operation. In view of the Court's indication in this case, I don't intend to labor the matter but I would like to quote some of the important statements of the [207] House of Lords in that case which indicates the position that the Court would take in any case



where a war vessel is engaged in her service in time of war; that that in itself is a warlike operation. And a collision resulting from the fault of a vessel engaged in a warlike operation—or where it is mutual fault as in the Roanoak and the Travanion—there can be no doubt that the damage so caused to either vessel is the consequence of a warlike operation.

It is very interesting that the findings of the arbitrator in the Travanion-Roanoak case are substantially what the Court has indicated the findings would be in this case. The findings of the Arbitrator in the Roanoak case were as follows:

“That the Steamship Roanoak”—which was a war vessel—“at the time in question was in possession and control of the United States of America, under bare boat charter during the period from the 25th of June, 1918, to the 25th of January, 1919. She was employed by the United States of America solely for Naval purposes as a regularly commissioned mine planter of the United States Navy, operated by the Navy Department, officered by commissioned [208] officers of the United States Navy and manned by a United States Navy crew. At the time of the collision with the Travanion the Roanoak, under her aforesaid public employment and officered and manned as above, was proceeding from Falkland to Virginia in the United States, the 700 mines aboard belonging to the Navy Department of the United States of America, and was carrying no other cargo and no passengers. She



was exhibiting regulation lights. There was no evidence before me as to the circumstances under or the purposes for which the mines in question were being carried.

“Having carefully considered the evidences of said collision, I find that it was caused by the negligent navigation of both vessels and that both were equally to blame. The said negligence consisted in a bad lookout on both, insufficient parting by the Travaniion and failure to keep her course on the part of the Roanoak.”

It is plain that the Arbitrator held that the Roanoak, the same as an auxiliary vessel in this case, [209] was a war vessel. And collision with another vessel constituted a collision in consequence of a warlike operation.

Lord Warrington’s reasoning on this case is stated as follows:

“Hostilities were suspended but the war was not at an end. In my opinion it was open to the Arbitrator to hold that notwithstanding the suspension of hostilities, the voyage of the Roanoak under the circumstances found by him was a warlike operation. The Arbitrator has found that during the period—including the day of the collision—the Roanoak was employed solely for naval purposes as a regularly commissioned mine planter, carrying a large cargo of mines. In a state of war that fact is in my opinion enough to constitute her voyage a warlike operation.”

And it certainly pleases me that the Court, not

even reading this decision or this language has come to the same conclusion in regard to the Roustabout; that she, too, like the Roanoak, was a United States naval vessel about her service in time of war with commissioned officers aboard in charge and [210] enlisted personnel. It really makes no difference what she was carrying.

This is Count Sumner's reasoning:

"The appellant's proposition is that it was not enough to prove what the Roanoak was unless it was also shown what she was doing. I recognize the high importance of considering the ship's errand and the purpose of her voyage but I should have thought that, having proved an animal at large to be a lion, it was not further indispensable to prove that he was not at the moment merely performing like a lamb, unless, of course, some circumstance of bovine behavior happened to be apparent.

"We have no right in law or in fact to assume without evidence that such a ship is not engaged on the duty or the service for which she forms part of the Navy to which she belongs. The mere fact we do not know why she was sailing away from the area of hostilities for purposes unknown does not establish such conclusion."

And so forth.

Lord Warrington—the emphasis to be placed upon the basis of his decision is that the Roanoak was employed solely for naval purposes as a regularly commissioned mine planter carrying a large cargo of mines.

“In a state of war” he says “that fact is in my opinion enough to constitute here a warlike operation.”

So we have at least three cases during the first war really; the hospital ship which was returning to base in the First World War; we have the Travonian decision where hostilities had ceased and she was in American waters on her way to Virginia; and we have the two cases set forth in one opinion—that of the Tartar, the submarine, turning on her beat and coming into collision. We have His Majesty’s Ship, the Devonshire, which was going to a convoy. Those cases are certainly sufficient, in my opinion, and certainly in Mr. Long’s opinion, to meet this contention or any possible contention that the direction in which the ship is going at the time makes any difference as long as she is performing the naval duties for which she was intended in time of war.

One minute’s discussion on the developments of the law since Judge Bowen’s decision, if the Court [212] please. Since that time and right on the same point, too, we have had a case—which is cited in our trial memorandum—involving a tanker, a commercial tanker, not a naval ship at all; and she is carrying a cargo of oil to war bases. Under the cargo carried theory adopted in the Coxwell case she was, ipso facto, a war vessel. Under the Umbrella theory of causation adopted in the Coxwell case, anything that she might do in the course of her warlike operation was a consequence of a war-

like operation. The vessel on this occasion had left a war base of supply and was moving to another war base to distribute the oil. She came to anchor during the evening and was placed there by a patrol boat. The patrol boat left her, and during the night, why, she pulled anchor. She anchored again and the next morning it was found that she had pulled anchor and that she had stranded and caused damage to her bottom.

The court held in that case that the damage was a consequence of a warlike operation. There we have, again, a temporary suspension of any movement with respect to the war. But it just illustrates how far the courts have gone on determining what is a warlike operation within the terms of a free and [213] capture warranty of a marine policy.

There is one other point I would like to speak about with the permission of the court with respect to Judge Bowen's decision, and that is also on the matter of causation.

The Court will recall, in reading his decision, that Judge Bowen based it upon the Queen Insurance Company case. Following our briefs upon the subject, he decided that Justice Holmes' reasoning in the Queen Insurance Company case, that there was an important reason to keep in harmony with the British law on the subject of marine insurance. That was paramount in Justice Holmes' reasoning that the cause of the loss should be that cause which is nearest to the loss.

So that Judge Bowen, following Justice Holmes' paramount reasoning, followed the Travaniion-Roanoak case and took a white cow case out of the bag and said, "This is it." But I want to point out to the Court that in our supplemental brief on this question to Judge Bowen, we discussed the question of causation, and in view of counsel's trial memorandum referring to the Standard Oil case, where the court adopts language from the Queen Insurance case, "That [214] in the matter of causation we will look to the cause nearest the loss"—in view of that I wish to point out to the Court the fallacy of the reasoning in the District Court in New York. That theory of causation was abandoned in the Leland Shipping Company case, an English case. This is all contained in our supplemental brief.

In the Leland Shipping Company case they abandoned the theory of causation—that it is the cause nearest the loss—and said that it is the efficient cause, the direct cause.

It is interesting to note that in the Lanza Fruits Steamship and Importing Company vs. Universal Insurance Company, 302 U. S. 556, the United States Supreme Court adopted the theory of causation set forth in the Leland Shipping Company case and stated, "It is true that the doctrine of proximate causation is applied strictly in cases of marine insurance but in that class of cases, as well as in others, the proximate cause is the efficient cause



and not merely the incidental cause which may be near in time to the result.”

So I say this: that if the Court has occasion to write a decision in this matter, which certainly is an important matter and which would be welcomed by the [215] shipping industry and the great field of marine insurance, that if the Court desires he may clarify the decision of Judge Bowen in these two respects: first, that it makes no difference which direction the vessel was going; and secondly, that the matter of causation apparently intended to be followed by Judge Bowen was somewhat that of an umbrella theory adopted in the Coxwell case which is the leading case on the subject today. Also that the United States Supreme Court has adopted a theory of causation of the English court in the Leland Shipping Company case, that theory being that it is the efficient cause and not the cause nearest to the loss.

Mr. Henke: If your Honor please, this case from a standpoint of war risk is very startling in the sense that it is one of the few cases—only cases—that you can point to where a collision has occurred between two vessels under circumstances which are absolutely the identical peacetime circumstances under which those vessels would navigate, and it has been contended that it was a war risk loss.

The evidence in this case is uncontradicted [216] that both vessels were navigating with their regular navigating lights, that all navigating aids were



in full force and effect. They were following the so-called Inside Passage to Alaska in the manner it is regularly followed by all vessels which follow it today and which followed it before the war. There was no enemy action within that Inside Passage. The officers—the Captain of the Roustabout and the members of the crew who testified both testified that they never saw an enemy ship, they never saw an enemy plane, and they were there for a period of some four years; in the case of the last young man. I believe the Captain had served for a like period.

They were running this ship which was an old converted tanker. It was a tanker which comes under the classification of a yard oiler or small tanker used for servicing points around a Naval Base. It was not a vessel that went to sea. The Admiral admitted that it was a very slow ship. It had about half the speed of an ordinary Liberty ship—the type of Liberty ship which was built as an emergency ship on the basis of “build as much as you can.” The Liberty wasn’t designed as a particularly fast ship; it was a relatively slow ship. Yet this tanker has, as its maximum speed, half the speed of [217] the Liberty. Likewise, as the Admiral testified here today, a Liberty merchantman was more heavily armed than was this little vessel, the Roustabout.

Now, everything, so far as the entire background of this case, is absolutely the normal situation that you would find in peacetimes. That accident could

take place today under the same circumstances and without the effect of any claim or basis of claim of it being a war action. Counsel has in his argument, here, told the Court that it was proper to consider the statement of Judge Holmes in the *Queen* case, that it was desirable that the law of the United States and England correspond as much as possible on all questions of insurance, in view of England being a marine insurance market. He disregards the *Queen* case otherwise and says that the *Queen* case should not be considered further.

The *Queen* case is a collision case. The *Queen* case involves a claim for collision of the vessels known as the *Nappaly* and the *Lymington* which occurred during the last war. The *Nappaly* was a vessel loaded with war supplies proceeding in convoy to Italy. She was struck by the *Lymington* as she was coming out of the Mediterranean as the convoy she was with was going in. As a matter of fact, it [218] occurred as an error of the naval convoys in not advising one convoy that the other was coming. In that case the Supreme Court said that the primary cause was the failure of navigation of the two vessels. The *Nappaly* collided with the *Lymington* and that was a marine risk. Now, of course, that was a much stronger case so far as collision was concerned than is the case here.

In that case you have a vessel which is operating under entirely war conditions—lights out, proceeding in convoy, under the most difficult circumstances; and she comes into collision with another

vessel. That is the *Queen* case, a decision of the Supreme Court of the United States.

In this case, here, we have the simplest of circumstances. There cannot be pointed to one thing which is indicative of a war condition. The only thing that can be claimed as a war condition is that the *Roustabout* was carrying fuel oil from points in Seattle to Sitka, Alaska, for the Navy. Now consider that point if you will, which of course was not before Judge Bowen. He merely had the bald statement that she was engaged in a warlike operation carrying petroleum products between the naval bases.

The Admiral testified today that Sitka, where this vessel went to, was approximately 1100 miles from Dutch Harbor which was the only point which the Japanese undertook even to make one bombing raid on during the war; that it was approximately 2,000 miles away from Kiska and Attu, where the Japanese made a landing. That vessel in her entire journey shuttling back and forth, as counsel likes to use the word "shuttle" as it is used in the settlement agreement, was just going back and forth carrying petroleum and she was not at any time in a situation where you could point to her and say, "Here, this vessel is engaged in a warlike activity; she is in the war zone; she is operating under war conditions."

As far as this operation was concerned, the Standard Oil Company could have continued that same operation during the entire period of the war.

Instead of that, the Navy took it over and put this Roustabout under a Navy crew and had it perform the same functions.

There is no case Counsel can point to which justifies the situation of a tanker of this type returning empty to her base of supplies that would be considered in war operations. The only case involving a vessel which can be considered at all is this rather unusual Roanoak case which Counsel referred [220] to and which is the case in which there was an American minelayer with apparently a full load of mines which was returning from England and her operations there, which came in contact with a British vessel on her return voyage, which was shortly after the Armistice. She was over there in minelaying operations and the Armistice was signed and she was returning to the United States with her load of mines—returning to her base in this country. That case holds in effect that the Roanoak was at that time still engaged in a warlike operation with a load of mines aboard when she collided with the other vessel.

In this case, here, you have merely an empty oil tanker—not even a fleet tanker—just a pure yard oiler, probably as low as you can get in the line of tankers, returning to Seattle to load fuel again for a return to these bases in Alaska.

It is to be noted that, as the Admiral testified, these bases that they were serving were normal naval establishments from which patrols were maintained in just the same way as patrols were

maintained from Seattle, San Francisco, Los Angeles, and every other place, for the purpose of determining whether or not there was any enemy activity off the Coast.

Those circumstances all show the extreme conditions [221] which exist in this case which is claimed to be a war risk loss. The cases which Counsel referred to as the English cases are all clearly distinguishable from the situation which is before the court here. Counsel refers to the last English case having to do with the tanker which was damaged at an emergency naval base in Scotland. Now, there of course, is a question where war risk may properly be claimed. That vessel, with a load of fuel oil, was brought to Scotland by the British Government under requisition. She went to what was an emergency harbor, a special harbor arrangement which was established by the Royal Navy to take care of some of their emergency operations. She immediately passed under the control of a Royal Navy Harbor Master. He told her to anchor at a specific spot. They anchored at that specific spot. And it later developed that that was over a rock or reef which, while the vessel swung, resulted in her being grounded on this rock or reef and being substantially damaged.

The corresponding American case, which counsel says should be disregarded, is the case involving the Standard Oil Company vessel. Now, there, we have a vessel which was sent by the Standard Oil Company from the United States and ports in



Columbia to France [222] to deliver oil to a French subsidiary of the Standard Oil Company of New Jersey. When she arrived in France, she arrived in France about the time that France was falling and she went from one French port to another until finally she was directed by one of the naval vessels to proceed to Falmouth, an English port, to be unloaded. She arrived at Falmouth and when she arrived there, of course, the entrance to the harbor was mined. She wanted to secure her entrance, and she hoisted the international signal that she desired to enter and desired to have someone lead her in. A small British patrol vessel came along, and hoisted the signal "Follow me." They proceeded to follow this small English patrol vessel which apparently was attempting to lead her through the mines into the harbor. In the course of that journey into the harbor and through the mine field, the patrol vessel apparently was unacquainted with the amount of water that the American vessel drew and, as a result, put her on the rocks and she suffered substantial damage. In that case the Standard Oil Company made demand against the marine underwriters for loss. The marine underwriters said, "No, that is a war risk loss." Our court held, "No, that wasn't a war risk loss. This vessel was under no restraint. She suffered damage only by reason of [223] an ordinary fault of navigation." In other words, until you could show that the Navy had taken this vessel and forced her to follow this particular course, it still remained a



marine risk, indicative of the more liberal view, let us say, of the American courts.

In the present case we have the situation of a tanker—a tanker manned by a Navy crew. She is returning light. She has no more war cargo. She is now moving away from even the remote field of the war as far as we are concerned. She is in British Columbia waters. She is traveling with all of her navigation lights. The vessel with which she collides is traveling with all of her navigation lights. And under those circumstances the whole situation is such that it is an extreme stretch of the imagination to say that that is a war risk. That is a collision which could have occurred in normal peacetimes. It is a collision which could occur to-day and no one could point to any phase of it and say “That is an abnormality which could not exist today” or “That is an abnormality which could not exist except during the period of the war.”

Judge Bowen was passing upon the allegations of the liability and, of course, giving them the benefit of the doubt, as he was obligated to do, under the circumstances. There we have a tanker—without [224] a description of the tanker—moving to war bases in Alaska for all the world knows, moving right out into the combat area with the fleet, coming into collision under circumstances which might be extremely hazardous, and extremely like that of an ordinary war condition.

The circumstances were the vessels were traveling without lights. The circumstances were the

navigation aids were removed. The circumstances were the Roustabout could be said to be engaged in a substantial naval operation, a substantial naval movement.

Now, that isn't the situation here. The facts in this case show very clearly that the situation is extremely the other way around—that the conditions are absolutely normal. There is not a war-like item which contributes to this loss. And so the Queen case considered, and the other related cases considered, it is apparent that under the circumstances which the proof now shows, the plaintiff is not entitled to recover. If the plaintiff is entitled to recover in this case—is permitted to recover in this case—it will unquestionably be the most extreme war risk case which has ever been decided by the American or British courts. It will be a decision based entirely upon the theory that the vessel belonged to the Navy—if she is in [225] collision—and anything could be said to be negligent on the part of the Navy, then it is a war risk loss. That was certainly never the intent of the insurance company and it was certainly never the intent of the parties.

The recitals as contained in the War Settlement Agreement—a copy of which I anticipated having here for your Honor today but which I will see is properly submitted to you—do not go beyond this even under the settlement covering risk assumed under the old FC&S cause which this is. **Immediately upon this question being raised, as it is**

raised in this case here, this complete clause was rewritten. The War Shipping Administration taking over completely rewrote the clause to eliminate any possibility of a contention of this character being made. As the contracts are today, no contention of this kind could be made. That is of course shown by the agreement which is referred to and published in the American Maritime cases.

The whole contract of war risk has been changed to eliminate the possibility of a claim of this character being advanced—even claims related and similar to this. So that under the circumstances which exist here, there is no showing which justifies [226] a recovery on the part of the plaintiffs. Their loss was clearly a marine risk, clearly a risk which should be paid by the marine underwriters on the vessel. The marine underwriters assumed the responsibility for those damages which resulted in the normal navigation of vessels of this type. No one can say any phase of this case, as shown by the evidence, isn't normal. And to now take and say the war risk underwriters—the chaps who took the possibility of here being damaged by being torpedoed or enemy action or some similar loss—are now the ones to bear the loss of this ordinary collision between these two vessels is an extreme contention. I respectfully submit that after your Honor has considered the decisions which would be applicable here and applies them to the facts in this case that you will agree that this is not a war risk loss but is a marine loss which should be borne

by the marine underwriters and be put over on the war risk underwriters.

Your Honor indicates that it was your thought that the circumstances here show mutual fault. I would just like to say that the evidence here does show, I think quite clearly, that the Eastern Prince was moving with lights which were wholly improper. [227] The decisions generally are uniform——

The Court: Just a moment on that point. Your trial brief assumes that the lights were proper—that the navigation lights were proper on both boats. So isn't that out now—that question of——

Mr. Henke: No. My trial brief said the navigation aids having to do with the lights on the shore, and that the vessels were traveling under normal conditions where they were showing their regular lights; that is, there was no black-out in the sense that—in other words, most of these war risk cases, your Honor, occur in situations where vessels are traveling at night; for example, with their lights out in convoy where you have got maybe twenty-five or thirty vessels traveling without lights and by reason of that fact they collide with one another; or two convoys meet and, not having their lights, they collide with each other. But the point that we made in our brief was the conditions upon the inside passage as it existed at this time were normal; that is, they were conditions as they exist today, no different now than they were then. You had all of your lights and shore signals and no

buoys removed. No navigation aids were removed and the vessels traveling on the Inside Passage were all [228] traveling with their regular navigation lights.

The evidence here shows I think beyond question that the Eastern Prince was at fault in this instance in that she was exhibiting lights which were unauthorized. Her lights were in such a condition that the Master and crew of the Roustabout were thoroughly deceived as to what they were approaching. As the Captain of the Eastern Prince testified, he had four lights on the main deck under the boat deck, which were of equal power to the lamps which he had in his red and green running lights. Of course, those lights being colored would be less visible. And all that the crew of the Roustabout saw were these white lights. They couldn't recognize the red and green lights until the Captain of the Eastern Prince made this maneuver of his, when he turned his ship sharply towards the shore; and when he did that and brought the ship around sideways, then they could for the first time distinguish his running lights. But as far as the crew of the Roustabout were concerned, all they saw were a series of white lights.

As they testified, up in these waters that they were going through there were many fishing vessels up there. And when you look at the rear of one of these fishing vessels, you see practically the [229] same thing that they thought they saw, which was the one white light at the top of the mast, the white



light which fishing vessels show 360 degrees and several white lights down below which is typical of these fishing vessels at night—the white lights below being reflected out of the cabin of the fishing vessels.

The Eastern Prince there, of course, the failure to exhibit her proper lights and the exhibition of improper lights, which makes it even worse, thoroughly deceived the Roustabout as to what was approaching, so that the Master of the Roustabout and the crew figured, “Well, here is just another one of these fishing vessels which we will, of course, be obligated to swing around; we are overtaking it, we will swing around it.” And, of course, it was not until they were right on top of it and unable to protect themselves that the Master of the Eastern Prince threw his vessel hard over to the right and then they were able to determine that they were not overtaking a vessel but were now approaching one head on.

Under all of these circumstances, as shown there, I think there is not sufficient evidence here of any claim of negligence on the part of the [230] Roustabout so far as that accident was concerned.

The Court: You contend that there was no fault on the part of the Roustabout?

Mr. Henke: That is correct, sir. Her Master was thoroughly deceived. He acted reasonably in the light of what he understood the circumstances to be. I don't think that you can say that there is anything which is quite as deceptive and quite as negligent as to put a vessel in such circumstances



that the other vessels operating in the area, particularly in a narrow water of this type, cannot determine which way the vessel is going; they are deceived. It is sort of like a Studebaker automobile when he gets through; they formed the opinion that he was going the same direction they were. There is no question about these lights being exhibited. And, of course, these men that testified, that we had here, the Captain and the young Chief Boatswain, who testified today, they have no interest in the case one way or the other as far as they are concerned. Their testimony is largely disinterested.

And as the young man testified here today, he was standing in the bow of the Roustabout and watching this vessel, and he concluded that they were merely overtaking it and that it was merely another [231] fishing vessel, and all because of these improper lights. Under those circumstances, the Master of the Roustabout was thoroughly deceived. They say that he was—they raised the question of position in the channel, but naturally, opposite the Campbell River, he is going to attempt to protect that type of vessel from grounding. It is very difficult to say, "Now, you should be 'way over on the other side." Whereas, if you will recall the testimony of the young man who was the Quartermaster on the Eastern Prince, that it was a relative matter of a few minutes from the time of the collision that it took him to get over into Campbell River; so the Captain was correct in his analysis that he was off the Campbell River estuary where he was in some danger of grounding a vessel of the type of the

Roustabout. He acted reasonably. Of course, his assumption was that in moving through these waters with these small fishing vessels, it was his obligation to avoid them and he was attempting to do that. But, of course, the thing that threw him off completely was the fact that the Eastern Prince was not moving in the direction which he had a reason to anticipate from her lights, but was moving exactly in the opposite direction. Of course, when that situation developed, then of course [232] the collision was inevitable. So that, under those circumstances, we submit that the Master of the Roustabout under the circumstances should not be charged with negligence. And the negligence of the Eastern Prince is, of course, obvious. She had improper lights.

The Court: What have you got to say, Mr. Henke, on the question of him being on the wrong side of the channel?

Mr. Henke: That is the point I was mentioning. I don't say that he was on the wrong side of the channel. You may have a point which you designate and say, "This is mid channel." But you will always recall the Captain's testimony that he was then off the estuary of the Campbell River and that he was leaving himself sufficient room to protect himself against the possibility of a vessel of that type running aground in the Campbell River estuary as he passed it.

Of course, bear in mind that he saw the whole passage ahead of him; that is, he saw the whole inside passage that was available to him then, with no

vessel approaching as far as he was concerned; so that naturally, had he been conscious of the fact that there was another vessel approaching, he would probably have taken some action to have either stopped his ship or [233] have otherwise acted to protect himself against the double hazard of the possibility of collision and the possibility of going aground in the Campbell River estuary. But under those circumstances he figured that he was perfectly justified in proceeding and overtaking this vessel which was ahead of him.

Remember that the vessel which he assumed that he was overtaking was from his standpoint moving in the same direction he was. He was moving to overtake this vessel, and he was not considering the possibility of a vessel moving in the other direction—in the opposite direction. He had no reason to suspect that, because he could see no lights of any approaching vessel. All he could see was a vessel going in the same direction as himself. And, as far as he was concerned, bear in mind that this vessel that he saw, that he was approaching, was further over—from his standpoint, was further over in the middle of the channel than he was. So that I don't think that under those circumstances he could be considered as acting unreasonably at all.

He was trying to protect his vessel against the estuary. He was doing it on a reasonable basis. He saw the vessel which he was overtaking, which was further over near the east shore—that is, towards [234] the mainland—than he was. It seems to me that his actions there are entirely reasonable

and thoroughly in accord with the International Rules. He never had a chance to clear himself after the status of the Eastern Prince became known to him.

All agree that the Eastern Prince, when they made this turn hard to the right, then the Eastern Prince was put in such a position that the Roustabout could see those lights. But until that occurred, the Roustabout couldn't see those lights. Of course, bear in mind that there is this situation which exists in respect to those two vessels: (1) The Eastern Prince, here, is a vessel which lies rather low in the water, a relatively small ship. She is low in the water and she has all of the lights on her; whereas the crew of the Roustabout are way up high as compared to the Eastern Prince; that is, they are about 25 or 30 feet up above her. And, of course, all that they see is the glare of these white lights; so that their analysis is, of course, that she is merely one of these smaller vessels going the same way as they are. So it doesn't seem to me that the Roustabout is chargeable with negligence until you show some situation where the Captain was put on notice that there was an oncoming vessel and that he was obligated to do [235] something to protect it.

I don't think there can be any question that the Eastern Prince, with the lights that she had on her—and, of course, I think the decisions generally show that the carrying of improper lights is considered one of the negligent things that can be done, because in navigating at night all that the Master of the vessel has to go on is the lights you show. If

you show lights which are improper and deceive him, he, of course, will act in a manner which is entirely inconsistent with what the facts would be. So that we would submit that, under the circumstances there, the Master of the Roustabout was without fault and the accident itself was solely the result of the negligence of the Eastern Prince.

It seems to me that the two questions—first, the basic question as to the existence of war risk circumstances which would justify a recovery; and second, even though it could be assumed that the Roustabout was operating as a war ship, as that term is employed, that the Master of the Roustabout was sufficiently negligent to justify a recovery or was negligent at all. So that under the circumstances we submit that the libelants are not entitled to recovery—and, as I say, we desire to submit this [236] brief so that your Honor may fully appreciate our position on the question.

Mr. Long: May it please the Court, I have no desire to belabor many of these points but I would like to touch upon some of them.

We had in mind opening the argument by discussing the characteristics of the Roustabout, her functions and the navigation of the two vessels. The Court has indicated mutual fault to be the Court's conclusion under the evidence.

I would like to touch briefly upon the glaring faults on the part of the Roustabout; first, the Narrow Channel Rule. All agreed that the vessels were operating under International Rules.

Article 25 of the International Rules is known



as the Narrow Channel Rule and provides that a vessel shall stay to its right or starboard side of mid-channel. I asked Captain Parks—and subpoenaed him to be here—whether or not at the time of and prior to the collision he was navigating on the east or portside—to him—of mid-channel. He admitted that he was. He is thereby guilty of a statutory fault without further ado.

It has been suggested that the reason he was [237] navigating on the easterly shore or his wrong side of the channel, the same as if I was driving my car down the best side of the road, was because there was not enough water on his side of the channel. I asked him if there was enough water to go to the right and he said it was safe but not practical.

There is no doubt as to where this collision took place. It is marked on the exhibit by Captain Rose and the testimony given by Captain Parks was just the same. It was on the left-hand side, on Captain Parks' left-hand side of this narrow channel. All are agreed that this is a narrow channel; Captain Parks and Captain Rose and all of the witnesses who were interrogated on this subject.

The Court can see very plainly, Captain Parks being southbound and the collision having occurred on the eastern side of the channel, there is as much as 34 fathoms, three-quarters of a mile to his right—six feet to the fathom, and his vessel draws about twelve feet. So he had thirty-two fathoms under his keel, three-quarters of a mile to his right. So



it seems to me that disposes once and for all of any question concerning a violation of the Narrow Channel Rule.

I asked Captain Parks, as the second question: [238] "Did you, after sighting the lights of the Eastern Prince, alter your course without sounding the whistle signals required by the International Rules?" He said, "I did." That is the second statutory fault.

Since the inception of this case, which I investigated in Vancouver on behalf of the owners of the Eastern Prince, I was never able to satisfy myself as to why the Roustabout, after presumably seeing the Eastern Prince's red light, turned left—across the channel, further to the left and ran into her. I couldn't understand that. I understand it now, after hearing the lookout of the Roustabout, here this morning—who I had never heard or seen before. I call the Court's attention to his testimony very briefly and it is this: He was asked "What were your duties as a lookout?" He said—which is true—"My duties were to be in the bow of the ship and look forward and call the navigating officer's attention to logs, lights, and other ships and report them." He was then asked, "Did you see the red light of the Eastern Prince?" He said, "I did." He was then asked, "What did you do?" He said, "I took no action whatsoever." Now, it is plain to me as to what happened. I don't know what the lookout was doing but I am satisfied that he was guilty of negligence [239] in failing to report that ship. The decisions are so uniform. I

could point to literally dozens of them on the subject but I will read just briefly from the Rules of the Road by Commander Wordsworth, page 252, in which he cites and quotes from two cases from the Circuit Court of Appeals in the New York District, the outstanding Admiralty Circuit:

“The failure of the lookout of a steamer to report a vessel when discovered is negligence, although the Master and pilot were on the bridge. A lookout’s duty is to report as soon as he sees any vessel with which there is danger of collision or which in any way may affect the navigation of his own, and he can not speculate on the probabilities of collision, such responsibility being for the Master.”

It is a most elementary phase of collision law that it is the duty first to have a competent lookout when circumstances require, and they did here, because they had one; and secondly, it is the duty of the lookout to report what he sees. That is what he is there for. That is why they put him out in the eyes of the ship and he is forward of the bridge and can see better. Further, the International Rules require a [240] lookout, a proper lookout. The courts have said time innumerable “The mere fact that you station a man on the bow and call him a lookout, even though he may be qualified, he is an improper lookout under the Articles—International Rules—if he fails to perform his function as a lookout.” He becomes improper because he is negligent. And certainly we have from the witness’ own mouth—he saw the red light of the Eastern

Prince and he took no measures whatsoever. That is the third statutory fault.

With respect to this argument, which is not novel in these cases—collision cases are heard in this court every day in which vessels have been backing to stern for at least ten minutes but they still collide. It has been testified here that they thought they were overtaking a vessel by seeing only white lights. If that be true, they are still hung by their own statement and guilty of a fourth statutory fault. Article 24 of the International Rules makes it mandatory for a vessel overtaking another one to keep out of the overtaken vessel's way. In other words, you overtake a vessel at your peril. You either stop—if there is any danger of overtaking a vessel and passing her—you are [241] absolutely at your peril when you pass an overtaken vessel unless you are satisfied that your passing is completely safe either to one side or the other by appropriate whistle signals. No whistle signals were sounded here in any respect.

So we have by the Master of the *Roustabout* admittedly two statutory faults. And the testimony of the respondent's witness on the stand this morning, Beasley, an admitted fault in his failure to perform his duties as a lookout, failure to perform the duty after he saw it and failure to keep out of the way of an overtaken vessel, if that is what they thought it was. They are hung whichever way they jump here.

I have tried Admiralty cases in this court for twenty years and I have never seen a case in which

there are more glaring faults as in this case, here, on the part of the Roustabout. I have never seen such glaring faults admitted in court. I disregard entirely the testimony of the interested witnesses. I take the testimony of Captain Parks and Beasley. They are guilty of four statutory faults beyond a peradventure of a doubt. I don't believe counsel could argue to you the contrary.

Be that as it may, for the purposes of this case we are concerned with the sole fault on the part [242] of the Roustabout or mutual fault. For the purpose of this case it makes no difference whatsoever. I gather that the Court's view is that there is possibly some fault on the part of the Eastern Prince. I am not going to labor that point. But certainly I am going to labor the point that there were at least four statutory faults on the part of the Roustabout beyond any question whatsoever.

In connection with that fault, I call the attention of the Court to the so-called Pennsylvania Rule. Those who practice collision law are either delighted with that rule or horrified with the rule, depending upon which side of the case they are upon in a good many instances.

The rule is that one who violates a statutory rule has the burden of showing that not only did not the violation contribute or that it probably didn't contribute but that it could not possibly have contributed.

Judge Netterer has said, and the Circuit Court of Appeals has said, in discussing that rule, that it is a stringent rule, it is a tough rule, but therein

lies the penalty to the violator of the rules of the road. We have cited that case in our memorandum.

There have been numerous cases in which they have exhaustedly treated that rule and its application. In a couple of cases, much to my unhappiness, they have treated it in an unfavorable light in cases I was in. The Denalley case, the Princess Sofia, Nelson against Puget Sound Navigation Company—all of our own Circuits—have held that the Pennsylvania Rule does apply in case of a statutory fault. So the burden is upon the respondent, here, or upon the part of the Roustabout to show that those faults or either of them could not possibly have contributed. That is an impossible burden. I don't know of any way to meet it. And, of course, here there is no evidence whatever that it didn't contribute, let alone any presumptions.

On the question of—I just want to mention one other phase of this. The Court may recall that I interrogated Captain Parks as to how soon he could stop his ship dead in the water under those circumstances. He said that at eight miles an hour, of course, a ship does travel 600 feet a minute approximately. It is slightly more than that, but take his figure. He said it would take him three minutes to four minutes at best to stop, under those circumstances; and he didn't start to stop until he saw the [244] red light of the Eastern Prince, he admitted. So he must have seen the red light of the Eastern Prince almost a half mile away, under his own computations, and all he had to do was to go hard right and he would miss the ship entirely; in



other words, get to his side of the channel or somewhere near it and there would have been no collision.

The Court will recall Mr. Beasley's testimony. He said, "After I saw the red light, I took no steps whatsoever about it." He said that the course of their vessel was changed—not to the right to avoid a collision, but to the left. At all times, he says, the *Eastern Prince* was going to her hard right. So here we have two vessels coming, and they just come together; just the same as if your Honor was driving a car down the road and turned across to the left, across the oncoming traffic, and the other car turning to the right to try to miss him. It is just that simple, to me.

So much for the faults of the *Roustabout*. Now, with respect to the characteristics of this vessel. I am satisfied and I hope the Court is that the testimony here goes far beyond and is much stronger than any allegations in our libel. I didn't know that this vessel carried bombs northbound and I [245] didn't know she carried damaged airplane parts, torpedo cases, and was actually on a shuttle service until this case started. But here we have this situation: We have a former merchant vessel, taken over by the Navy and commissioned as an active arm of the Naval Forces, in the prosecution of the war; and there just isn't any question about it. All of the witnesses stated so. She is armed, and manned with officers of the Navy, manned with unlicensed enlisted men of the Navy and performing a very vital function in those early days of the



war, of prosecuting the war effort which was very critical in Alaska waters at that time, I can assure you.

It seems to be Counsel's contention that because before her induction, let us say, into the Navy, she was a Merchant ship; and after she had served her functions during the war years, she possibly became a Merchant ship again—I assume she did, I don't know—and thereby she was just a peaceful Merchant ship and not a war ship. It seems to me that that argument is answered in this way: The Court knows that many men selling shoes, selling papers and in every walk of life as civilians were inducted into this man's army and handed a gun. After they served their service, if they survived it, they went back to selling shoes, [246] selling insurance. Can it be said that those men weren't soldiers and members of the Armed Forces before they went in the Army, merely because they weren't before? Positively not.

Here we have a ship engaged in shuttle service—that isn't Counsel's argument—the witnesses said that, including Mr. Beasley whom I had never seen before. Admiral Zeusler said she was in a shuttle service and explained it. Commander Jones, who had jurisdiction of her, said she was in that service. Captain Parks said she was in that service. I don't know how else we can prove it except by the men who know. She was engaged in the vital mission of carrying petroleum products, materials of war, armament from war bases right here in Seattle—

no commercial bases, no commercial docks—right out from Pier 91, a naval base, to the very vital war bases in Alaska—for what use? For the use of the fighting forces of our Navy and Coast Guard in those waters.

Counsel apparently placed some stress on the fact that the Japs didn't attack Southeastern Alaska with forces of planes or men. The testimony is plain that a submarine was sunk near Sitka and they were patrolling out there with both aircraft and [247] naval surface craft. Let me ask what this company was insuring when they were insuring war risks? They insured this vessel for war risk and they took our premium and yet the warrant is as follows: "Warrant confined to waters of—(reading)—British Columbia and Southeastern Alaska, not west of Cape Spencer."

Now, Cape Spencer is the beginning of the Gulf of Alaska up near Juneau. The Japs attacked out to the westward, it is true, so far as their land forces were concerned. It doesn't seem to me to lie in Counsel's mouth to say that the Japs were firing over there 2,000 miles away but they took the premium and confined it to just these waters. Why? Because there were war risks there. That is why we bought the insurance and that is why they issued it. It goes, I think, somewhat to the frailty of the suggestion made by Counsel.

It makes no difference, it seems to me, if your Honor please, whether or not this Roustabout was coming south to Seattle again with nothing in her tanks but salt water and nothing aboard but salt

water. She was coming back for what purpose? To get another load of war materials and fuel oil and get back up there and keep the war going. That was her function and it was her function all during the war. But we have more [248] than that here. We have evidence that she did bring armament southbound. She brought defective ammunition, she brought torpedo cases, she brought gasoline drums for refilling and returning. She did the normal things that any vessel returning would do. I can see no difference whatever in her situation, here, than if the Battleship Washington or the Carrier Lexington or any of our primary fighting fleet—after having been in the war zone—returned to Bremerton over here for a new crew or re-supplies or whatever was needed; if that vessel coming back in the sound had struck another ship, no one would contend that that wasn't a war risk under any of the conditions.

Admiral Zeusler and Captain Parks said this was just as important a ship as any ship the Navy had. You couldn't use a battleship to do this job; you couldn't use a carrier to do this job; you had to use a tank vessel. Counsel has suggested that the function of this vessel, because of her designation "YO," which means Yard Oiler, would confine her to these waters. The Court will recall that I asked Commander Jones, in connection with this designation "YO," if she had to be there and he said, no, that is in reference to her tonnage. The larger vessels are "AO's" and the smaller ones "YO's." But that seems [249] to me to be immaterial here.

What did she do? She carried cargo between these naval depots. I can't imagine of any more necessary function, short of being sunk by aircraft or war shelling.

This question basically was argued before Judge Bowen all of one day and parts of two or three other days. It was exhaustively argued. Counsel has indicated that he wishes to file further briefs. I listened carefully to see just what material he expected to be covered by such a further brief. He has indicated no new cases determinative of this issue since the filing of Judge Bowen's opinion in 1944. I think, your Honor, that we are now in a position for the Court to decide this case, make findings and dispose of it. I know of nothing new that Counsel has indicated as argument he desires to present in any further briefs. I don't mind the additional work but I don't think it is going to accomplish anything. I don't know of any further cases that he has suggested that he would cite in a further brief. I shall leave that, of course, to the Court's own discretion in the matter.

I am not going to review all of these war risk opinions. I think they are carefully presented in the briefs so far filed. With those remarks on those two particular subjects, I will close. [250]

The Court: Considering that there were just two facts that the Court really was required to determine and pass on here—first, the question of whether or not this was a war risk or a war operation; and second, whether or not the ship *Rousta-bout* was at fault, I feel convinced that my findings

would be as indicated. But still I don't want to deprive counsel of the right to present further argument or authorities; and while I made the statement, which was more or less emphatic as to my views, I am always willing to be convinced. Those views were an expression of my feelings but there is nothing at all involved in this case or in any other case that I would foreclose the idea that if I was convinced that I was wrong, that I wouldn't graciously and gladly decide the other way.

If Counsel thinks that he can convince me that my views, expressed here, are wrong, I am going to give him an opportunity to do so.

Mr. Long: We will cooperate.

Mr. Henke: I think I owe it to my client.

The Court: I think I owe it to you or anyone else in your position to be willing to listen and consider. I want to do that.

Mr. Long: Very well. We will share the [251] expense of the record, your Honor, as we have indicated.

The Court: If there is nothing further to be done at this time in this case, the matter will stand submitted until the briefs are filed.

Twenty, twenty, and ten, is that a satisfactory apportionment of the time?

Mr. Long: I think that is satisfactory, your Honor. If we happen to be on vacation, when Counsel filed his brief, we might be a day or two overtime.



The Court: I don't think we will have any difficulty on that score.

Mr. Henke: No.

Mr. Long: No, I believe not.

(At 4:10 p.m., Thursday, July 17th, 1947, Court recessed, the present case being submitted on the record with briefs to be filed as indicated by the Court, the case being taken under advisement, decision to be rendered at a later date.) [252]

#### CERTIFICATE

I, Merritt G. Dyer, Official Court Reporter, United States District Court, do hereby certify that I reported all of the proceedings in the foregoing case and that the transcript thereof is a full, true, and correct statement of the proceedings occurring therein.

/s/ MERRITT G. DYER,  
Official Court Reporter.

[Endorsed]: Filed Oct. 8, 1947. [253]



[Endorsed]: No. 12001. United States Court of Appeals for the Ninth Circuit. General Insurance Company of America, a corporation, Appellant, vs. Henry O. Link, E. W. Elliott and O. L. Grimes, Appellees. Apostles on Appeal. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division. Filed July 31, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

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In the United States Circuit Court of Appeals  
for the Ninth Circuit

In Admiralty—No. 12001

GENERAL INSURANCE COMPANY OF  
AMERICA, a corporation,  
Appellant,

vs.

HENRY O. LINK, E. W. ELLIOTT,  
and O. L. GRIMES,  
Appellees.

ADOPTION OF POINTS TO BE RELIED  
UPON ON APPEAL AND DESIGNATION  
OF PORTIONS OF APOSTLES ON AP-  
PEAL TO BE PRINTED.

Comes now the General Insurance Company of America, a corporation, Appellant in the above-

entitled case, by its attorneys, Skeel, McKelvy, Henke, Evenson & Uhlmann, by Harry Henke, Jr., and hereby formally adopts the Assignment of Errors filed by it in the court below as the Statement of Points to be Relied Upon by the said appellant, On Appeal.

Appellant further designates the entire Apostles on Appeal, with the exception of the original exhibits which have been transmitted to this court by the court below, to be printed.

Dated at Seattle, Washington, this 9th day of August, 1948.

SKEEL, McKELVY, HENKE,  
EVENSON & UHLMANN,

By /s/ [Illegible],  
Proctors of Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed Aug. 12, 1948. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STIPULATION AUTHORIZING CONSIDERA-  
TION OF ORIGINAL EXHIBITS

It is hereby stipulated and agreed by and between the appellant, General Insurance Company of America, a corporation, by and through its proctors, Skeel, McKelvy, Henke, Evenson & Uhlmann, and the appellees, Henry O. Link, E. W. Elliott, and O. L. Grimes, by and through their proctors, Bogle, Bogle & Gates, that the original exhibits introduced at the trial of the above entitled action shall be considered by the above entitled court in their original form without the necessity of their being printed.

BOGLE, BOGLE & GATES,

By /s/ THOMAS L. MORROW,  
Proctors for Appellees.

SKEEL, McKELVY, HENKE,  
EVENSON & UHLMANN,

By /s/ (Illegible),  
Proctors for Appellant.

It is so ordered.

Done in open court this 25th day of August, 1948.

/s/ WILLIAM DENMAN,  
Judge of the United State Court of Appeals for the  
Ninth Circuit.

[Endorsed]: Filed August 27, 1948. Paul P.  
O'Brien, Clerk.

